73-1229

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

RICHARD J. ISRAEL, as Attorney General of the State of Rhode Island, the CONSTITUTIONAL RIGHT TO LIFE COMMITTEE OF RHODE ISLAND, and ANN FRANK, guardian of Child Doe, Child Roe, and Child Smith,
Petitioners,

v.

JANE DOE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RICHARD J. ISRAEL,
Attorney General
W. SLATER ALLEN,
Assistant Attorney General
250 Benefit Street,
Providence, Rhode Island

JOSEPH P. WITHERSPOON
Townes Hall, 2500 Red River
Street, Austin, Texas 78705

Attorneys for Petitioners

FRANCIS J. BOYLE
112 Bellevue Avenue
Newport, Rhode Island

Of Counsel

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RICHARD J. ISRAEL, as Attorney General of the State of Rhode Island, the CONSTITUTIONAL RIGHT TO LIFE COMMITTEE OF RHODE ISLAND, and ANN FRANK, guardian of Child Doe, Child Roe, and Child Smith,
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v.

JANE DOE, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Richard J. Israel, as Attorney General of the State of Rhode Island, the Constitutional Right to Life Committee of Rhode Island, a non-business corporation organized and existing under the laws of the State of Rhode Island, and Ann Frank, as guardian of respondents' unborn children, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered November 14, 1973 in three proceedings consolidated below. Petitioners have made

every effort to keep this petition as brief as possible. Its length is due to their firm belief that this case is the most important case to be presented to this Court since *Dred Scott* v. *Sandford*, 19 How. 393 (1857) and that it was essential in the public interest to make the following presentation.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto, as does the opinion of the District Court for the District of Rhode Island, reported at 358 F. Supp. 1193 (1973).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 14, 1973. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a woman lacks standing to sue in an action in which she seeks to have a state's anti-abortion statute declared unconstitutional, on the basis of the abortion right enunciated in *Roe* v. *Wade* and *Doe* v. *Bolton*, where she voluntarily obtained an abortion before trial and where she had not previously obtained professional medical advice based upon an examination

that termination of her pregnancy was necessary or appropriate.

2. Whether unborn human children have standing to appear, by their guardian appointed by an appropriate state court or by guardian *ad litem*, in an action by their mothers seeking a declaratory judgment that a state's anti-abortion statute is unconstitutional; and, whether those children are indispensable parties to and have a right to intervene in that action.

3. Whether an unborn human child at and after its conception is a human being entitled to protection of the fundamental civil right to life under the Thirteenth Amendment and Due Process and Equal Protection Clauses of the Fourteenth Amendment, and implemental legislation, in light of the actual purpose of the framers of those provisions.

4. Whether a human child who has been or may be born alive as the result of an abortion, and who is or may be capable of surviving with reasonable medical care, is a citizen or potential citizen, respectively, whose life is protected by the Citizenship Clause of the Fourteenth Amendment.

5. Whether the fathers of unborn human children of mothers and members of their class are indispensable parties to, and have standing to intervene in, a class action by such mothers seeking a declaratory judgment

that a state anti-abortion statute is unconstitutional and alleging that each of them wishes to have an abortion prohibited by that statute.

6. Whether the district court abused its discretion by certifying this a class action under Rule 23, F.R.C.P., where: (a) no notification of any character was required to be nor in fact was given anyone respecting the pendency of the action and the class-action certification sought therein; (b) the unborn children of the class and their fathers were entitled to such notice, adequate representation and an opportunity to be heard under the due process clause of the Fifth Amendment, either as members of the class ultimately certified by the district court or as absent persons having rights that would be finally adjudicated in the action; and, (c) the district court failed utterly to observe the other requirements of Rule 23, F.R.C.P.

7. Whether the courts below lacked jurisdiction for failure to convene a three-judge district court under 28 U.S.C. §2281 in this action where the plaintiffs were awarded a declaratory judgment that the Rhode Island statute is unconstitutional, together with a class-action certification equivalent to an injunction in practical effect.

8. Whether the present declaratory-judgment action, being one of serious public concern, should be reversed for lack of equitable ripeness.

9. Whether the proceedings below are void for denial of procedural due process because the district court ruled summarily and refused to hear argument by petitioners upon the following: the motion to intervene by the guardian of respondents' unborn children; the Attorney General's motion for appointment of a guardian *ad litem* for such children; petitioners' motions for continuance based upon the absence of expert witnesses whose testimony would probably have affected the result of the case; and, the petitioners' offer of proof by other expert witnesses.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

1. Article III, Section 2 of the Constitution of the United States.

2. The Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

3. 18 USC 241, providing for punishment of persons going on the premises of another, with intent to prevent his free exercise or enjoyment of any right secured by the Constitution of the United States.

4. 18 USC 1584, providing for punishment of persons holding or selling another person into any condition of involuntary servitude.

5. 28 USC 2201, creating the remedy of declaratory relief in a case of actual controversy in the courts of the United States.

6. 28 USC 2281, requiring a district court of three judges before granting of an injunction against any state officer to restrain his enforcement or execution of a state statute attacked as unconstitutional.

7. 28 USC 2282, requiring a district court composed of three judges before granting of an injunction

restraining enforcement, operation or execution of any Act of Congress attacked as unconstitutional.

8. 42 USC 1983, creating a statutory civil action for deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

9. 42 USC 1985 (3), creating a statutory civil action when two or more persons go on the premises of another for the purpose of depriving that person of certain rights.

10. 42 USC 1985(3), creating a statutory civil action when two or more persons go on the premises of another.

11. 42 USC 1988, governing proceedings brought and conducted for the vindication of civil rights.

12. Rhode Island General Laws, 8-10-3, establishing a family court.

13. Rhode Island General Laws, 8-10-43, concerning powers and duties of the family courts of Rhode Island.

14. Rhode Island General Laws, 11-3-1 *et seq.* (73-S 287 Substitute A) creating a criminal offense with respect to certain abortions and providing punishments.

15. Rhode Island General Laws, 11-9-5, respecting child cruelty, creating an offense and providing punishments.

16. Rhode Island General Laws, 14-1-1 *et seq.*, the Rhode Island Family Court Act, governing proceedings in the family court.

17. Rhode Island General Laws, 23-51-1, respecting the consent of parents and others to medical treatment of minors.

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Rule 19, respecting the joinder of persons needed for the just adjudication of actions.

Rule 23, governing class actions.

Rule 24, governing intervention.

The provisions of the aforementioned constitutional and statutory materials are lengthy and their pertinent texts are therefore set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

Mary Roe, Jane Doe and Sally Smith (pseudonyms) attacked, in a civil action brought in the District Court for the District of Rhode Island, the constitutionality of that state's new criminal abortion statute, Rhode Island General Laws 11-3-1 *et. seq.*, (73-S 287, Substitute A), enacted on March 13, 1973 (App. 326-328, 663-665). The statute prohibits abortion except when necessary to preserve the life of the mother. The statute establishes a legal presumption of fact that "human life commences at the instant of conception and that said human life at said

instant of conception is a person within the language and meaning of the Fourteenth Amendment of the Constitution of the United States . . ." Respondents' complaint in the action seeks injunctive and declaratory relief, and requests the designation of a class of plaintiffs. The respondents invoked the jurisdiction of the district court under Title 28, U.S.C. sections 1331, 1343, 2201, 2202, 2281 and 2284.

The respondents complained of Richard Israel, petitioner, in his official capacity of Attorney General of the State of Rhode Island, alleging that they were pregnant and that the defendant had stated publicly that he intended to enforce the statute. Each respondent alleged that she desired an abortion in Rhode Island though it was not necessary to preserve her life. The Attorney General, early in the proceeding, moved the district court to appoint a guardian *ad litem* to represent the unborn children of the respondents (App. 17). The district court denied the motion, finding that the children lacked standing until the court found that they were "persons" in contemplation of the Constitution, a matter that could not be decided until after the trial (App. 157-158, 146, 21).

Others sought to intervene in the action, alleging that they possessed *private* interests and rights exposed to adjudication in the action, separate and apart from the *public's* interest then being represented by the Attorney General. The first to do so was the Constitutional Right to Life Committee of Rhode Island ("the Committee"), a non-business corporation

organized and existing under the laws of that State. The district court permitted the Committee to intervene in a "limited status" that was never defined by the court save by *ad hoc* rulings made as the action proceeded. These rulings essentially prevented this intervenor from proceeding independently (App. 157) and thwarted such intervenor's principal efforts in behalf of the other two petitioners (App. 20-21, 135-136, 146-148, 150-152, 284-293, 305-306). Ann Frank sought to intervene in the action in her capacity of temporary quardian of respondents' unborn children (App. 145). She had been previously appointed to that position by a decree of the appropriate Rhode Island state court (App. 108-110). She alleged that "disposition of the action may, as a practical matter, impair or impede the ability of (the children) to protect their interest unless their interest is adequately represented in this action . . . ." She attached to her motion the pleading of petitioners Child Doe, Child Roe, and Child Smith, alleging that they and their fathers are indispensable parties and asserting a counter-claim founded upon the Thirteenth, Fourteenth and Ninth Amendments to the Constitution of the United States; 42 U.S.C. 1988 as the vehicle for enforcing 18 U.S.C. 241 and 1584; 42 U.S.C. 1983 and 1985(3); 14-1-1 *et seq.*, 11-9-5, 11-3-1 *et seq.*, 23-51-1, General Laws of Rhode Island; and, basing jurisdiction upon 28 U.S.C. 1331, 1343, 2201, 2202, 2281 and 2284. The counter-claim and answer (pp. 1, 5-10, 14-15) sought a declaratory judgment that the children could not be aborted

without the informed consent of their fathers and that the new State anti-abortion statute is constitutional, together with an injunction restraining respondents from aborting these petitioners in violation of the foregoing provisions. The district court denied the guardian's motion to intervene, basing its denial upon its findings that "The applicant's (sic) interest is adequately represented by existing parties" (App. 146) and upon the proposition that the wards had no standing until the court determined that they were persons under the Constitution (App. 4). The court made no finding concerning whether the private interests of the wards in their lives were adequately represented. Lastly, fourteen male citizens of Rhode Island[1] moved for intervention as indispensable parties to the action, alleging themselves to be fathers of fetal children and husbands of women capable of bearing children who might become pregnant in the future, the same children of respondents' class (App. 689). They alleged in their motion and attached pleading that they possessed rights and interests in the fetal children and in their marital status that were exposed to adjudication in the action, adopting the basic allegations of the

[1] The men are Gary Brennan, whose wife was alleged to be in the first trimester of pregnancy; John Manning and John Andrade, whose wives were alleged to be in the second trimester; Stephen Malo, whose wife was alleged to be in the third trimester; and, the following men who alleged that their wives were not then pregnant but might at some future time become pregnant: J. Robert Bergeron, Samuel Ramsey, John Hand, Anthony Nicolosi, Edward Martin, Damian Fedoryka, Maurice LaFreniere, Robert Sullivan, Lester Manning and Gerald Lemay.

respondents' children (App. 692). They sought also the designation of a class of persons. They alleged the class to consist in the fathers of those fetal children created *ipso facto* by the district court's designation of a class of plaintiffs composed of pregnant and potentially-pregnant women. Their motion to intervene was filed after the court's designation of a class of plaintiffs composed of "all women who are now or may hereafter be prevented from obtaining a legal (sic) abortion in Rhode Island because termination of their pregnancies is not necessary to preserve their lives" which designation was not made until the district court entered its final judgment in the action a month after trial on the merits.

By order entered April 9, 1973, after commencement of the trial, the district court declared that plaintiffs had agreed in chambers to abandon their prayers for injunctive relief; and, declared that the court was satisfied that the Attorney General would respect and recognize any declaratory judgment issued by the court, subject to his appellate rights. The court then ordered the plaintiffs' complaint amended to exclude the prayer for injunctive relief (App. 130). The Committee was not party to any agreement made in chambers for it had no notice of nor opportunity to attend the in-chambers discussion.

The single-judge district court commenced to hear the action on April 4, 1973, and continued it for further

hearing on April 12 and 13, 1973. No pregnant plaintiff or class representative appeared at trial—each plaintiff and representative who did appear had obtained an abortion in another state immediately upon the filing of the complaint on March 26, 1973 or shortly thereafter (App. 175, 188). One pregnant witness appeared at trial. Her testimony was offered as that of a pregnant member of the class certified by the court a month after trial, but not then certified to exist. She testified that she would have an abortion on the day after her court appearance (App. 204-205). The district court rendered judgment on May 16, 1973, declaring the Rhode Island statute unconstitutional and certifying the class of plaintiffs described above. The Attorney General, the Committee, and Ann Frank, as guardian of Child Doe, Child Roe and Child Smith, perfected a consolidated appeal to the First Circuit Court of Appeals.

The First Circuit affirmed the judgment of the district court in a Memorandum and Order entered November 14, 1973. The Court of Appeals held, in short, that each substantive[2] argument raised on appeal by defendants had been unequivocally rejected by the

[2] The Court of Appeals did not specify what arguments on appeal it considered "substantive." Eliminating those specified as "subsidiary" by the court, the appellants' brief in that court attacked the class-action designation; the ruling adverse to the legislative fact finding that the unborn child is a human being; the mootness of the plaintiffs' claim in view of their procuring voluntary abortions before trial; the court's failure to dismiss the action for lack of equitable ripeness; and, the court's failure to convene a three-judge district court. Such matters the Court of

Supreme Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). The First Circuit held, with respect to the "subsidiary matters" raised on appeal, that the trial court had decided correctly as a matter of law or had acted within its discretion.[3]

Appeals ostensibly considered substantive and foreclosed by the Supreme Court decisions in *Wade* and *Bolton*.

[3] The Court of Appeals specified the following to be subsidiary matters: the defendants' contention that the plaintiffs lacked standing, individually and as class representatives, (a) because of their having voluntarily procured abortions before trial, thereby depriving themselves of a case or controversy, and (b) because they did not possess interests arguably within the zone of interests guaranteed by the constitutional provisions relied upon by the Supreme Court in *Wade* and *Bolton*; the defendants' contentions that the unborn children of plaintiffs and plaintiffs' class had standing under the Thirteenth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and implemental federal and state legislation, and were therefore indispensable parties to the plaintiffs' action and entitled to intervene as of right by their guardian, Ann Frank; and, defendants' contention respecting the failure of the district court to appoint a guardian *ad litem* and its failure to allow the intervention of the fourteen Rhode Island men, and members of their suggested class, and to rule that they were indispensable parties to the action.

REASONS FOR GRANTING THE WRIT

The decision in the Court of Appeals deserves the attention of the Supreme Court for the following reasons:

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURT AS TO THE PROPER INTERPRETATION AND APPLICATION OF THE DOCTRINE OF STANDING TO SUE IN FEDERAL COURTS.

   a. *The respondents lacked standing in that their voluntary abortions before trial deprived them of a case or controversy in the constitutional sense by making it moot.*

The petitioners contend that respondents did not have standing to maintain this action. The contention is based first upon the fact that the only respondents to appear at trial were not pregnant—they had obtained abortions in another state on or immediately after filing their complaint and before trial. Only one pregnant woman appeared at trial and her testimony was offered as that of a member of a suggested class of plaintiffs. She testified that she had arranged an out-of-state abortion for the next day. The respondents' abortions, for themselves and as class representatives, rendered moot any controversy they may have had with the Attorney General so that the district court did not

have before it a justiciable case or controversy within the meaning of Article III, Section 2 of the United States Constitution, nor an actual controversy within the meaning of the first sentence of the Declaratory Judgment Act, 28 U.S.C. 2201. The respondents were not thwarted by the statute they attacked. The First Circuit summarily disposed of petitioners' contention in this respect by citation and reference to the Supreme Court's discussion of standing in *Wade*, 410 U.S. at 125, respecting the totally different situation of a woman's normal 266-day gestation period ending in the midst of the litigation. That decision of the First Circuit conflicts directly with the Supreme Court's decision in *Hodgson* v. *Randall*, 402 U.S. 967 (1971) affirming on appeal the judgment of a three-judge district court in *Doe* v. *Randall*, 314 F.S.32 (D.Minn. 1970) dismissing the complaint and holding that Doe's voluntary abortion before trial had nullified any case or controversy she may have had previously respecting the enforcement of Minnesota's anti-abortion statute. The decision of the First Circuit also conflicts in principle, if not in decision, with the Supreme Court's opinion in *Wade* where the Court reaffirmed the traditional doctrines of standing, justiciable controversy and mootness, 410 U.S. at 124-129, with respect to Roe, the physician Hallford, and the childless married couple described as "the Does." The Court held simply that the natural and inexorable course of a normal-term pregnancy will not be permitted to thwart a woman's right to appellate review of her case or

controversy. There was absolutely no indication that the Court intended a revolutionary departure from the traditional requirements, including "the usual rule in federal cases that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated (citations)." 410 U.S. at 125.

The First Circuit's decision of the standing issue in this case also raises important doubts and questions about the continued integrity of the constitutional doctrine of justiciable case or controversy generally. If respondents may voluntarily reorder the essential physical events upon which they have predicated their complaint, subsequent to its filing and without fear of mootness and loss of standing, there exists no logical reason why other plaintiffs may not do the same thing with respect to quite different controversies. The First Circuit's decision exposes the federal courts to that very probability. The Supreme Court should first examine such a revolutionary doctrine after full development and consideration of the general consequences of the First Circuit's decision in the judicial administration by federal courts. The present action presents the issue clearly along with a need for its resolution.

b. *The respondents lacked standing in that their allegations and testimony showed them not to be proper plaintiffs to raise the issues sought to be litigated.*

The decisions below, with respect to standing, conflict with the decisions of the Supreme Court in *Association of Data Processing Service Organization* v. *Camp*, 397 U.S. 150 (1970) and *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) and the requirements with respect to standing enunciated in those two decisions. The respondents, because of their voluntary abortions obtained on their demand and without medical intervention into the abortion decision, lacked an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," 307 U.S. at 153, for the Supreme Court in *Wade* and *Bolton* emphatically rejected the contention that the abortion decision was absolute and one solely for the mother to make, 410 U.S. at 153, 164, 166 and 192 (Mr. Justice Blackmun); 410 U.S. at 208 (Mr. Chief Justice Burger); 410 U.S. at 215, 219-220 (Mr. Justice Douglas).[4]

The right to an abortion on demand, contended for by respondents, did not, therefore, lie within the zone of interests protected by the constitutional guarantees upon which the Supreme Court predicated its decisions in *Wade* and *Bolton*.

Data Processing enunciated a second requirement

[4] The Supreme Court of Michigan construes *Roe v. Wade* to mean "that the abortion decision is a medical decision, to be made by a physician in consultation with his patient." *Larkin v. Cahalan*, 208 N.W.2d 176, 179 (Sup. Ct., Mich. 1973). Also see Mr. Justice Douglas' opinion in the Supreme Court's denial of certiorari in *Cheaney v. Indiana*, 410 US —, 36 L.Ed. 2d 1 (1973).

with respect to standing. There must exist an "injury in fact," 397 U.S. 150, 152, which the Supreme Court in *Morton* interprets to be "an injury to a cognizable interest." *Morton* requires further "that the party seeking review be himself among the injured" relative to that cognizable interest, 405 U.S. 727, 734. The pregnant plaintiffs in *Wade* and *Bolton* placed themselves "among the injured" by seeking abortions and being refused, 410 U.S. at 120 and 185, by reason of the statutes in force in Texas and Georgia respectively. Respondents in the present action have not alleged that they acted similarly, with like results, nor have they in fact so acted with like results. They are not among those injured by the statute's operation—they wanted abortions on demand and they obtained them. There is not a sufficient nexus between their claimed injury and the Attorney General's action toward them sufficient to justify judicial intervention.[5] *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973). To hold, as did the First Circuit, that abortion on demand is arguably within the zone of abortional interests enunciated in *Wade* and *Bolton*, and the Fourteenth or Ninth Amendments upon which those cases were based, severely undercuts the policy of the Supreme Court established in those cases. The Supreme Court's expressions in those cases, respecting permissible areas of state action and participation of physicians in the abortion decision, can have no

[5] The "sufficien nexus" test was applied in an abortion context in *Crossen v. Breckenridge*, 446 F.2d 833, 839 (6th Cir., 1971).

meaning if the respondents have standing to maintain this action.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURT RESPECTING THE DOCTRINE OF STANDING AND INDISPENSABLE PARTIES AS APPLIED TO THE UNBORN CHILDREN OF RESPONDENTS AND THE RESPONDENTS' CLASS.

a. *The unborn children possessed an interest in their lives and safety arguably within the zone of interests protected by statutory and constitutional provisions, which interest was fundamentally different from that of existing parties.*

The issue of standing arose in the course of the trial in connection with the Attorney General's request that the court appoint a guardian *ad litem* for the unborn children of respondents; in connection with the motion to intervene by Ann Frank, the duly-appointed guardian of the children by virtue of a decree of the appropriate state court; and, in connection with the contention that the unborn children were indispensable parties under Rule 19 (a)(2)(i), F.R.C.P.

The district court refused to appoint a guardian *ad litem* and refused intervention by the duly-appointed guardian on the ground that such children could not

have standing until he had found them to be "persons" protected by the Fourteenth Amendment, a finding he would not make, if at all, except in his final judgment and opinion. Any interests arguably possessed by such children were thus precluded from presentation in the action, even on the threshhold issue of whether they arguably possessed an interest at all. The second ground upon which the district court refused intervention by the children, either by guardian *ad litem* or by their state-appointed guardian, was that the children were adequately represented by existing parties. The First Circuit affirmed the district court's actions, stating that the district "court's rulings as to this (guardianship) and certain proposed interventions were either correct as a matter of law, or were within its discretion."

The unborn children tendered a pleading with their notion to intervene, setting forth legal theories in defense of their lives differing fundamentally from theories advanced by the Attorney General and the Committee. The children sought to defend their lives as human beings, relying upon the Thirteenth Amendment's proscription of slavery and involuntary servitude, including its prohibition against taking their lives as the property of another; relying upon their rights as citizens, or potential citizens, under the Fourteenth Amendment should they be born alive, as many babies are, as the result of an abortion; and, relying upon numerous federal and state statutes

protective of citizens and human beings generally,[6] none of which were foreclosed for implementation by a State under *Wade* and *Bolton*.[7]

The pleading tendered on behalf of the children by their court-appointed guardian with her motion to intervene alleged many factual and legal issues not even remotely raised in *Wade* or *Bolton*. The Attorney General expressly recognized and affirmed that he did not represent the children's totally different interests

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[6] The statutes included: 42 U.S.C. 1988 as the vehicle for enforcement of the policy of 18 U.S.C. 1584 (involuntary servitude); 18 U.S.C. 241 (joint going on the premises of another to hinder his free exercise of a right secured by the Constitution or laws of the United States); Rhode Island General Laws 14-1-1 *et seq.* (dependent and neglected children); 42 U.S.C. 1983 (civil action for deprivation of civil rights); 42 U.S.C. 1985 (3) (depriving persons of rights or privileges; Rhode Island General Law 23-51-1 (requiring the informed consent of fathers to the contemplated abortions); and, the Rhode Island criminal abortion statute here challenged as unconstitutional.

[7] Relying upon state statutes and common law principles, the unborn children alleged that they were, or soon would be, dependent and neglected and that the statutes of Rhode Island, properly interpreted, required that the respondents (their mothers) refrain from procuring an abortion unless they had been each professionally advised by a physician, after an examination, that an abortion was necessary or appropriate; that the abortions, if medically advised, not be performed save by a physician; that the father's informed consent be required before the abortion; that the respondents be required to refrain from any cruel and unusual form of abortion; that each respondent be required to cause every reasonable medical effort to be made toward saving the child's life in the event it is born alive in the abortion; and, that if any respondent's child was then viable that she be required to refrain from obtaining an abortion unless it be in conformance with state law.

by appending to his motion for appointment of a guardian *ad litem* a pleading substantially similar to that appended to Ann Frank's motion to intervene as the children's state-appointed guardian. The Committee, in its "limited status", represented its own organizational interests in the litigation, and not the private interests of the children in their lives and safety.

The First Circuit erred and deviated conspicuously from the doctrine of standing elaborated by the Supreme Court when the circuit court based its rulings upon the children not having shown themselves to be "persons."[8] The unborn children's interests in their lives and safety, under the statutes and constitutional provisions enumerated above, were "*arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

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[8] In *Wade*, the Supreme Court observed that "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*." 410 U.S. at 162. Other courts have thought it not inappropriate to recognize the infants' standing, especially when their interests were not protected by other parties. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537, 538 (1964); *Doe v. Scott*, 321 F. Supp. 1358 (N.D. Ill., 1971); *McGarvey v. Magee Women's Hospital*, 340 F. Supp. 751 (W.D. Pa., 1972); *Byrn v. New York City Health and Hospitals Corp.*, 38 A.D. 2d 316, 329 N.Y. Supp. 2d 722, 727 (1972); *cf. Application of the President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, 1007-1008, n. 15 (D.C. Cir., 1964) *cert. denied*, 377 U.S. 978 (1964); *People ex rel Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769, *cert. denied*, 344 U.S. 824 (1952).

Association of Data Processing Service Organizations v. *Camp*, 397 U.S. 150, 153 (1970) (emphasis supplied). That their claim was arguable indeed, and that they therefore possessed standing, is developed in the next reason set forth for granting the writ.

The district court and the First Circuit imposed upon the unborn children a "legal interest" test, an outmoded theory of standing rejected in the *Data Processing* case.

> "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. 153, (Mr. Justice Douglas for the Court)[9]

[9] A "being" may not necessarily have to be a *human* being in order to put before a federal court, by a representative, its interest in its own preservation. Mr. Justice Douglas and Mr. Justice Blackmun have eloquently argued that animate objects of a lesser order than human beings such as fish and even inanimate objects such as air should be recognized to have standing as "environmental objects to sue for their own preservation" in federal courts. *Sierra Club v. Morton*, 405 U.S. 727, 742, 755 (dissenting opinions). To deny unborn children the same opportunity, when they are universally recognized to be human beings in many important respects, is the height of absurdity. To deny live-born aborted babies that opportunity is unconscionable. The decisions below, in their obtuse and dictatorial certainty that fetal children can have no interests in their lives sufficient for standing, contrast sharply with the meticulous sensitivity of the Supreme Court in its careful treatment of the issue of life or death in *Furman v. Georgia*, 408 U.S. 238 (1972). "This is truly a case of life or death. Hanging in the balance are not only the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country awaiting execution.... (T)his fact ... necessitates that the decision be free from any possibility of error." (Marshall, J. concurring) 408 U.S. at 316.

The First Circuit's reasoning was circular in the extreme. The unborn children were required to show themselves persons before being allowed intervention to argue their private interests. They could make no showing or record in that respect, however, until they were allowed to intervene.

b. *The unborn children, by their representatives, were indispensable to a just adjudication under Rule 19(a)(2)(1), F.R.C.P.*

The decisions below, by force of the erroneous reasoning employed, could not consider whether the unborn children (by their guardian) were parties, for it was not conceived that they could have standing. The decisions in that respect conflict directly with the decision of the Supreme Court in *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902) where the Supreme Court drew clearly the distinction between the *public* interest exposed to adjudication in an action and *private* interests similarly situated. The Court, in that case, held the representatives of persons possessed of each character of interest to be indispensable parties, without whom the action could not proceed.[10]

[10] "It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have a right to be represented in the controversy by the companies whose stock they hold, and their rights ought not to be affected without a hearing .... Moreover, it must not be overlooked that it is not the private interests of stockholders that are to be alone considered. The directors of the (railroad companies) are appointed to represent

The *Northern Securities* decision established salient and guiding principles, applicable to the present action, as to whether the guardian of the unborn children was an indispensable party. The fact that it had not been established, at the commencement of the action, that the lives of the unborn children were protected by the constitutional and statutory authorities relied upon by their guardian, is not dispositive. The Court recognized in the *Northern Securities* case that the end result would be that the allegations of the bill in equity in that case were either well-founded or not. What was dispositive on the issue was that "a court of equity must insist that both sides of a controversy shall be adequately represented and fully heard." 184 U.S. at 246. The arguable interests of the unborn children have not been represented nor fully heard in the present action, for the Attorney General and the Committee did not and properly could not invoke the statutory and constitutional provisions relied upon by the guardian for protection of her wards' private interests in their lives and safety.

3. THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE ACTUAL PURPOSE OF THE FRAMERS

and protect, not merely the private and pecuniary interests of the stockholders, but the rights of the public at large .... It is not sufficient to say that the attorney general, or the governor, or even the legislature of the state, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a state ... cannot claim to represent both sides of a controversy." 184 U.S. at 245-246.

OF THE THIRTEENTH AMENDMENT AND OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO PROTECT EVERY HUMAN BEING, INCLUDING EVERY UNBORN HUMAN CHILD.

The scope of protection that government can provide for the lives of unborn children by legislation, or that these children and others can invoke in their behalf under the Constitution of the United States and implemental legislation, is and will continue to be a pressing problem for state legislatures, the Congress of the United States, and these individuals. Numerous statutes restricting or prohibiting abortion and protecting individuals and institutions from compelled involvement in the performance of abortions have been enacted by both state legislatures and the Congress since the decisions in *Wade* and *Bolton*.[11] At least twenty-five proposals for amendment of the

[11] Fifteen states have enacted statutes restricting abortion and protecting persons and entities from being compelled to perform abortions, while another fifteen states have defeated legislation that would simply conform to the guidelines set out in *Wade*. National Pro-Life Information Service (P.O. Box 9365, Washington, D. C. 20005), "Abortion Legislation Summary", September 28, 1973. Congress has passed legislation prohibiting use of federal funds for abortion under various programs, prohibiting conduct of research on a live human fetus outside its mother's womb, and protecting persons or entities receiving federal funds or assistance from being compelled to perform or allow performance of abortions: e.g., Pub. L. 93-189 (1973), 87 Stat. 316 (1973), 89 Stat. 91 (1973), and H.R. 7724. See also, 84 Stat. 1504 (1971).

Constitution to protect the lives of unborn children have been submitted in the first session of the 93rd Congress.[12] This case involves important issues concerning constitutional protection of unborn children that were not resolved in *Wade* and *Bolton*. These issues need to be resolved in order that the scope of new or projected protective legislation and constitutional amendments can be better appraised by legislatures and citizens and appropriate adjustments made in light thereof.

In *Wade* and *Bolton*, the issue was not presented, as it is in this case, whether unborn human children are human beings protected by the Thirteenth Amendment and implementing legislation, including 18 U.S.C. 1584, 241 and 42 U.S.C. 1988, from slavery and involuntary servitude as well as the badges of either, including deprivation of their lives by action of other individuals or by governments. Petitioners contend that the legislative history of S.R. No. 16 of the 38th Congress, Second Session, passed January 31, 1865, submitting the proposed Thirteenth Amendment to the States, demonstrates beyond possibility of serious doubt that the actual purposes of its framers were (1) to confer upon and assure to all in our political society who are *in fact* human beings the status therein of civil freedom, and to protect every human being from being subjected by any individual or government to slavery

[12] E.g., H.J. Res. 261, S.J. Res. 119, H.J. Res. 769, and H.J. Res. 427. *CCH Congressional Digest* 2353-2385, 4703-4742 (1973).

and involuntary servitude and the badges thereof; and (2) to include within the classification of human beings so protected unborn children at and after their conception.

Nor was it resolved in *Wade* and *Bolton* whether it was the actual purpose of the framers of the Fourteenth Amendment, as evidenced by its legislative history, in utilizing the word "person" in the Due Process and Equal Protection Clauses of that amendment, to refer to everyone who is in fact a human being and to include within the latter class unborn human children at and after their conception. Nor did this Court resolve in those cases whether, if the word "person" as used in the Fourteenth Amendment and the concept "human being" implied in the Thirteenth Amendment covers anyone who is in fact a human being, an unborn child at and after its conception is in fact a human being.

Petitioners contend that the legislative history of H.R. No. 127 of the Thirty-Ninth Congress, First Session, passed June 8, 1866, submitting the proposed Fourteenth Amendment to the states, demonstrates beyond possibility of serious doubt that the actual purposes of its framers with respect to its Due Process and Equal Protection Clauses were: (1) to protect all who are in fact human beings against deprivation of their lives, liberty, and property without due process of law or of equal protection of the laws by any state, the term "person" in these clauses having been intended to be

precisely synonymous with the phrase "anyone who is in fact a human being"; and (2) to include unborn human children at and after their conception within the classification of human beings protected by these clauses. Petitioners further contend that medical and scientific evidence demonstrates that unborn human children are in fact human beings so as to be within the group of those, who as human beings in fact, it was the purpose of the framers of the Thirteenth Amendment and of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to protect. Petitioners thus contend not only that these two Amendments confer authority on the State of Rhode Island to protect the lives of unborn children of respondents and respondents' class as it has through its 1973 anti-abortion statute (73-S-287, Substitute A, Gen. Laws, R.I.) but also that the Thirteenth Amendment and legislation implementing it provide these children with direct protection of their lives and liberties against the imminently threatened destructive action of respondents and respondents' class in obtaining abortions, protection that as indispensable parties they may invoke through intervention as of right in this class action.

The position taken below by petitioners with respect to coverage of the Thirteenth and Fourteenth Amendments was earlier considered and adopted by Mr. Justice Harlan in his dissenting opinion in the *Civil Rights Cases*, 109 U.S. 3, 26 (1883). He there stated:

> "If the constitutional Amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be in this Republic any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant." 109 U.S. at 62.

Mr. Justice Bradley, in the opinion for this Court in the *Civil Rights Cases, supra,* conceded most of the principal points of Mr. Justice Harlan's position by saying the Thirteenth Amendment (1) prohibits slavery and involuntary servitude from existing as institutions within our political society as well as any action "involving the idea of any subjection of one man to another", *Id.* at 22; (2) establishes, beyond this, "universal civil . . . freedom throughout the United States", and (3) "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery" and for protecting, as included within the civil freedom established for every man, "those fundamental rights which are the essence of civil freedom, . . ." *Id.* at 20, 24, 22. The majority opinion, however, disagreed that discrimination on account of race or color by any individuals or entities in providing public accomodations involved a fundamental right of human beings, a rationale subsequently rejected in *Jones* v. *Mayer*, 392 U.S. 409 (1968).

The legislative history of both the Thirteenth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment amply

demonstrates that it was the central purpose of their framers to protect every class of human beings and to protect them from being placed in practical subjection to any other class of human beings. This legislative history also demonstrates that these framers intended by these provisions to establish a definition or concept of human beings based upon biological reality and common sense or scientific truth. In their view, whoever is a human being *in fact*, as a matter of biological reality and common sense or scientific truth, is a human being *in law* protected by these constitutional provisions. The concept of person used in the Due Process and Equal Protection Clauses was precisely chosen by these framers for the purpose of establishing this definition. By basing the conception of human being or person utilized in the Thirteenth and Fourteenth Amendments upon the reality of "human beingness" in the concrete universe, the framers intended to take away the power of legislatures, courts, chief executives, or administrative agencies from ever again treating or defining as a non-human being one who is a human being in reality and in fact and by this legal technique of devaluation divesting him of legislative and constitutional protections designed for human beings. The reality which is a human being or person was thus made the foundation of all law and government. A human being was thereafter intended to stand outside of, before, and above law and government in the sense that these institutions must acknowledge and respect in our constitutional order the reality

within him that causes him to be a human being and must always act to serve and protect him. This new concept of a human being or person inserted into our constitutional order by these amendments is thus a concept of the real world, brought as such into the world of law rather than a concept of the usual artificial type in law whose definition is wholly dependent upon what its framers intended or purposed or upon what courts might assign to it in light of subsequent evaluations made for different purposes or considerations. Since the concept of the human being or person protected by these amendments was established as a concept of the real world for operation in the legal world, the framers intended that the process of defining that concept be one of giving reasonable and fair factual appraisals of the reality of "human beingness" observed in those generally agreed to be human beings or persons, and of fair application of such factual appraisals to any creature seeking the protection of these amendments. If any creature possesses the reality of "human beingness", as understood in the sciences of the real world and in common sense, that creature is a human being or person protected by these two amendments. Moreover, there is considerable evidence contained in the legislative history of these two amendments indicating most strongly that their framers intended that unborn human children be included within this concept of the human being.

William Windom, who served for many years as a

Congressman and later as Senator from Minnesota, provided an excellent insight into the concept of the human being to the protection of whom the Thirteenth Amendment is directed. One of the principal participants in congressional debates between 1862 and 1873 concerning civil rights, he spoke of the purpose of the Civil Rights Act of 1866 and the Thirteenth Amendment upon which it was based:

> "This, I believe, is one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp as a vital reality and embody in the forms of law the great truth that all men are created equal and endowed by the Creator with the inalienable rights of life, liberty and the pursuit of happiness. . . . Upon this, the only foundation which can permanently endure, we professed to build our Republic; but at the same time we not only denied to a large portion of the people equality of right, but we robbed them of every right known to human nature. And hence the broad grant of power was made to enable Congress to enforce the spirit as well as the letter of the amendment." *Congressional Globe*, 39th Cong., 1st Sess. (March 2, 1866) p. 1159.

John A. Bingham, author of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and a leading figure in the congressional debates involving adoption of the great constitutional and statutory civil rights measures between 1862 and 1873, provided a similar insight:

"That Constitution proclaimed that all men in respect of life and liberty and property were equal before the law, and that no person, no human being, no member of the family of man shall . . . be deprived of his life, his liberty, or his property, but by the law of the land. . . . (T)he great truth (is) that all men are created equal . . . in respect to those rights which are as universal as the material structure of man, as imperishable as his immortal nature, and to protect, not to confer which, all good Governments are instituted by man." *Congressional Globe*, 37th Cong., 2d Sess. (April 11, 1862) pp. 1638, 1640 (insertions added)

Referring to the first section of the Fourteenth Amendment, he stated:

"There was a want hitherto, and there remains a want now, in the Constitution of our country which the proposed amendment will supply. It is the power in the people . . . by express authority of the Constitution . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Congressional Globe*, 39th Cong., 1st Sess. (May 10, 1866) p. 2542. "Before that great law (the Due Process Clause) the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. . . . Under the Magna Charta . . . the inquiry was not whether the person was a man, but whether he was a freeman by the laws of England." *Congressional Globe*, 40th Cong., 1st Sess. (July 9, 1867) (insertion added)

The framers of these amendments distinguished both in their debates and in the terms of the latter amendment between the fact of being a person or human being and the fact of that human being or person being born; and, attached distinct legal consequences to each such fact. To the fact that one is a person or human being the Thirteenth Amendment attached the legal consequences of eliminating the imposition upon that human being of slavery and involuntary servitude and of creating for him a status of civil freedom including a guarantee of the fundamental rights to life, liberty, and property as against both individual action and governmental action. To the same fact the Fourteenth Amendment attached the legal consequence of the guaranty of due process and equal protection of the law whenever a state acted upon that human being. To the fact that a person or human being is born in the United States the framers of both amendments and the terms of the latter amendment attached the legal consequence of citizenship. According to these framers' views, as expressed by Bingham, a human being or person comes into existence as the objective reality required to be recognized and respected by law in our constitutional order through the specific creative act of God in infusing life and implanting human nature in that being. By virtue of the fact of having been created by this infusion and implanting, man was made "equal in respect to those rights which are as universal as the material structure of man, as imperishable as his immortal soul", to secure which both amendments were

framed. The framers did not discuss the matter of the time difference between the creation of each human being or person by God and the subsequent birth of such being. Obviously, however, the creative act was considered by the framers as taking place at a time considerably prior to birth since it was generally considered by the framers and other educated people of that time that the unborn child was alive and implanted with human nature before birth.

The framers also took legislative action that was specifically directed toward protecting unborn children. Indeed, the decade of the 1860's and the early 1870's was a period during which an extraordinary public effort was being made to obtain legislative protection for the unborn child at and after its conception. This effort had originally been launched by the American Medical Association in 1859 when it adopted the recommendations of its Committee on Criminal Abortion made following a two year period of investigation.[13] Central to these recommendations was the discovery in 1827 of the female ovum and its role in human conception by Karl Ernst von Baer.[14] The chairman of the Committee, Dr. Horatio R. Storer of Boston, in a study accompanying his committee's report stated that the foetus is from the very outset of its conception a living and distinct human being with its

[13] *Transactions of the American Medical Association*, Vol. XII (1859) pp. 27-28, 76-78.

[14] 2 *Encyclopedia Britannica* 1030 (1967).

subsequent history being one merely of development and its attachment to its mother in the womb being merely for nutrition and shelter. He affirmed that the foetus had from conception, however undeveloped, the intellectual, moral, and spiritual nature, "the inalienable attribute of humanity", and that the offence of abortion is "in every stage of pregnancy, murder."[15] His study criticized those five of twenty-one state anti-abortion statutes effective in 1859 that made quickening rather than conception the point at which abortion was illegal. He praised the Texas statute as "rationally and admirably drawn."[16] In his study he pointed out the general inadequacy of existing state anti-abortion law and in order that the abortion evil might be more adequately addressed he recommended (1) establishment of foundling hospitals to take care of children who were not wanted, (2) enactment of a specified new form of legislation to deal with the sale and distribution of drugs, poisons, and devices for causing unlawful abortion, and (3) revisions of existing anti-abortion laws in accordance with a proffered model statute so as to protect more effectively the unborn child from the time of its conception.[17] His committee's report and his study were widely circulated to federal, state, and territorial governments for legislative action and

[15] Storer, Horatio R., *Criminal Abortion in America* (Philadelphia: J. B. Lippincott & Co., 1860) pp. 10-11, 13.

[16] *Id.* at 77-87.

[17] *Id.* at 57-58, 94-100.

were widely discussed.[18] Newspapers, such as the New York Times, and state medical associations gave great publicity to the abortion evil during the 1860's and launched campaigns for revision of anti-abortion laws so as to protect unborn children at and after their conception.[19] Twenty-two states and territories revised or enacted anti-abortion laws to conform to many of Storer's suggestions between 1859 and 1873 and thirty-seven states and territories had such laws by 1873.[20]

Congress also acted to deal with problems of unborn children. In 1860 it conferred the status of legitimacy upon "issue of the second marriage, born or begotten" before commencement of a suit for divorce because of the existence of a prior spouse in the District of

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[18] *Transactions of the American Medical Association*, Vol. XIII (1860) p. 56) H. R. Storer, "Criminality and Physical Evils of Forced Abortions," *Transactions of the American Medical Association*, Vol. XVI (June 1865) pp. 707, 717.

[19] Means, Cyril, "The Law of New York Concerning Abortion . . .", *New York Law Forum* (1968), pp. 412-451.

[20] *Transactions of the American Medical Association*, Vol. XIII (June 1860) pp. 41-42; Storer, *Criminal Abortion in America*, p. 74; G. Grisez, *Abortion: The Myth, The Realities, and the Arguments* (New York: Corpus Books, 1970) pp. 374-410; see also, the list of states and territories which as of 1868 had anti-abortion laws in the dissenting opinion of Mr. Justice Rehnquist, *Roe v. Wade*, 410 U.S. 113 at 175-176 (1973).

Columbia.[21] In 1864 it enacted a law incorporating a "Home for Friendless Women and Children" in the District of Columbia.[22] In 1866, within a few months of enacting the Civil Rights Act of that year and passing the resolution submitting the Fourteenth Amendment to the states, Congress adopted the anti-abortion statutes of the states and territories then in existence or thereafter to be enacted for application in places of exclusive federal jurisdiction located within the states or territories through the Assimilative Crimes Statute.[22a] Moreover, in the debates prior to enactment of the law abolishing slavery in the District of Columbia there was strong criticism of both a statute and a practice in that District sanctioning the right of property to unborn children of slaves.[23]

Throught the period of the debate over civil rights measures their framers manifested a special concern with the reinstitution and protection of the family

[21] 12 Stat. 60 (1860); Congressman W. E. Simms of Kentucky shortly before enactment of this law stated: "This legal marriage relation establishes personal rights. The wife owes obedience to the husband and the husband protection to the wife, and both owe protection and care to their children. This relation lies at the very foundation of our whole social order. This law (pertaining to Utah) is to protect this relation; to protect the personal rights of husband, wife, and children that grow out of it." *Congressional Globe*, 36th Cong., 1st Sess. (April 3, 1860) App. p. 199. (insertion added)

[22] 13 Stat. 130 (1864).

[22a] 14 Stat. 13 (1866).

[23] *Congressional Globe*, 37th Cong., 2d Sess. (March 31, 1862) p. 1448 (Senator Charles Sumner of Massachusetts); (April 11, 1862) p. 1646 (Congressman Owen Lovejoy of Illinois).

relationship, the role of parents, and the personal rights of the father, the mother, and their children. While on the one hand deploring the fact that slavery subjected the slave father and mother to the constant threat of having their child taken away from them without redress being possible, the framers also emphasized that slavery destroyed the role of the father and mother as guardians of their children and the right of these children to the care and attention of their parents.[24] The framers' position with respect to parental guardianship of their children certainly contemplated that these parents could not, any more than could the state, take the life of unborn children who, like all human beings, are, in their view, created by God.

Congress by adopting in 1873 the first federal statute specifically dealing with the subject matter of abortion definitively settled the issue as to the understanding by that body in the 1862-1873 period concerning the significance of human conception and as to its purpose to protect the lives of unborn children at and after their conception. The author of this statute was Senator William Windom of Minnesota who was a leading advocate of civil rights measures between 1862 and 1873. Section 1 of the statute provided:

> "That whoever, within the District of Columbia or any of the Territories of the United States, or other

[24] *Congressional Globe*, 38th Cong., 1st Sess. (April 6, 1864) p. 1439 (Senator James Harlan of Iowa).

> place within the exclusive jurisdiction of the United States, shall sell, or lend, or give away . . . any drug or medicine, or any article whatever for the prevention of conception, or for causing unlawful abortion, . . . shall be deemed guilty of a misdemeanor, . . ." 17 Stat. 598 (1873).

This section employs a formula very similar to that contained in the legislation originally recommended by Dr. Storer, in his 1859 study, as essential for dealing effectively with the problem of unlawful abortion and protecting the unborn child at and after its conception. Moreover, this section necessarily recognizes that the legal concept of "unlawful abortion" had already been established in the territories and places of exclusive jurisdiction of the United States as a result of the enactment of earlier territorial anti-abortion statutes and, as a result of the only federal act dealing with the problem of unspecified crime in places of exclusive federal jurisdication, the Assimilative Crimes Statute of 1866, which had adopted state anti-abortion statutes, respectively. The 1873 act was thus a continuation of a federal policy initiated in 1866 and was designed to supplement the territorial and state statutes that had been previously adopted by coverning an important area of the abortion problem not adequately covered by those statutes. Finally the section specifically recognizes the scientific concept of human conception and quite evidently proceeds upon the basis that unlawful abortion has reference to the entire period of pregnancy from and after conception.

In addition to the foregoing, the evidence of modern science, important elements of which were introduced at the trial, supports the proposition that unborn children of human beings are within the group of those who are in fact human beings whom it was the purpose of the framers of these two amendments to protect by their provisions. Both the evidence introduced and that sought unsuccessfully to be introduced included significant data of this type that was not before this Court in *Wade* and *Bolton*. (App. 74-106, 135-145, 146-148, 150-152, 226-278, 285-293, 305-306, and 348-355). For this reason should this Court be persuaded by the argument of petitioners that the framers of these two amendments specifically intended to protect by their provisions all who are in fact and in reality human beings, then it is vital for this Court to examine the evidence introduced at trial bearing upon the humanity of unborn children. The testimony of Dr. Albert W. Liley, the founder of the new science of Fetology, is especially in point because it shows the remarkable interaction between bodily and mental functions of the child that is constantly taking place in the womb from the earliest stages of its development and increasingly thereafter; the responsiveness of the child to stimuli of light, sound, touch, pressure, pain, heat, and hunger (including in some important instances stimuli from outside the womb and mother); the processes of memory, habituation, and primordial learning that result from the former; and, the mental development while in the womb which is necessary to

assure intellectual integrity of the child at birth. (App. 226-278, 348-355).

It is vitally important to the jurisprudence of this nation, relative to the civil rights of its citizens, that the Supreme Court determine whether it was the specific intent of the framers of the Thirteenth and Fourteenth Amendments to protect by those amendments everyone who is in fact a human being and, as such, unborn human beings; or, whether, if they had the former general intent, the relevant evidence shows that unborn human children are among that category who are in fact human beings. While the Supreme Court seems to have affirmed the *Civil Rights Cases* and their holding that those amendments apply to any human being, this Court in the *Wade* case specifically refrained from deciding the issue of whether an unborn human child is a human being and the issue of when human life begins. The Court declared in that case, however, that such an unborn child is not a person within the protection of the Fourteenth Amendment. It is important that the nation have a clear answer to the question of whether it is sufficient that one is in fact a human being for him to invoke the protection of the Fourteenth Amendment; and, if this is so, whether the unborn child is in fact a human being. The Supreme Court has traditionally investigated, respected, and applied compelling evidence of legislative intent or purpose of the framers of the Fourteenth

Amendment.[24a] Although such type of evidence was not mentioned by the Court in *Wade*, the history of the amendment points very strongly to the conclusion contended for by petitioners.

Whatever is done in the future administration of the Fourteenth Amendment, a question remains respecting the continued applicability of the Thirteenth Amendment for the protection of the father and his child in the family relationship and their being made wholly subject as human beings to the will of another—be it the government or the mother of the child—as to the continued life of the child and the father's interest in the child and his family. The resolution of that question goes to the integrity of what has always been thought to be the foundational institution of our national life. If *Wade* is to have the operative effect of destroying constitutional protection of the family relationship, the role of guardianship of children on the part of both parents, and all interest of the father and of the unborn child in that child's life, despite the Thirteenth Amendment, it is imperative that Americans know definitively and soon that such is the case.

4. THE DECISION BELOW RAISES AN IMPORTANT QUESTION CONCERNING WHETHER A CHILD WHO IS OR MAY BE

[24a] See, *e.g.*, the opinion of Mr. Justice Douglas in *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

BORN ALIVE AS THE RESULT OF AN ABORTION IS A CITIZEN OR POTENTIAL CITIZEN PROTECTED, WITH RESPECT TO HIS LIFE, BY THE CITIZENSHIP CLAUSE OF THE FOURTEENTH AMENDMENT.

Respondent Sally Smith, who did not appear for trial, filed an affidavit in connection with the hearing on the motion for a temporary restraining order (App. 2). Paragraph "9" of this affidavit reveals that about mid-March, 1973, this respondent was in her 14-16th week of pregnancy (Affidavit of Sally Smith, p. 1). Thus, at the time of trial she was in her 18-20th week and at the time of final judgment she was in her 22-24th week of pregnancy. Moreover, although this action was certified as a class action, there was neither any proof at trial of the ages of the unborn children whom members of respondents' class sought to abort nor any restriction in the certification or decision of the District Court limiting abortion to unborn children of any age. An offer of proof by petitioners through expert witnesses, which was refused by the District Court, would have shown that abortions are regularly being performed on unborn children up to at least 26 weeks of gestational age and that while these children are usually being born alive by these abortions, they are, nevertheless, being allowed to die or are being destroyed without being given reasonable medical care to save their lives (App. 305). Petitioners' evidence further showed that some children at 20 weeks of

gestational age are capable of surviving with proper medical care and that children of 24 weeks or less gestational age are rather consistently being kept alive at any reasonably good pediatric service (App. 98-99). This evidence also placed viability of unborn children presently at 20 weeks of gestational age with the prediction that it may be shorter "very soon" (App. 99). The form of abortion frequently used at and after 20 weeks of gestational age is the hysterotomy, which in reality is "a little Caesarian" in which the uterine cavity is opened and the baby is extracted wholly intact. The umbilical cord is cut and then the baby is handed over to an assistant. Children are usually live-born by an hysterotomy form of abortion and sometimes by the saline method when the latter fails its purpose of killing the child in the womb (App. 84-85, 87, 83, 96-98).

Petitioners contend that children of at least 20 weeks of gestational age, such as the unborn child of respondent Sally Smith, petitioner child Smith, and other similar unborn children of respondents' class, are entitled to the protection of the Citizenship Clause of the Fourteenth Amendment since they are or may be "born" and "alive" by virtue of an abortion so as to be indistinguishable from other human beings who are "born" and "alive" by premature birth or birth at full term. Indeed, unborn children of the age of petitioner child Smith at the time of judgment below, 22 to 24 weeks of gestational age, are clearly viable, are regularly kept alive at any reasonably good pediatric

service, and do survive when given appropriate medical care.

It would seem clearly unconscionable for our judicial system, whatever it does with respect to protecting unborn children as human beings and persons under the Thirteenth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to deny constitutional protection to the life of a child aborted live-born or capable of being live-born. How could federal courts reasonably distinguish between a 22 week old premature Baby Jane who will probably survive because of reasonable medical care being provided her on order of her loving parents and a 22 week old Baby Boy "X" who has been live-born by an abortion who is capable of continuing to live and surviving if similar medical care is provided to him? Is Baby Jane a citizen while Baby Boy "X" is not? Does citizenship at this point of being live-born and of having a capacity to survive with reasonable medical care depend not on these physical factors but rather on the mere whim and caprice of the parents of such children and of their physicians? To say that there is a difference between these children with respect to being citizens under the Citizenship Clause is to draw a distinction that this Court has been unwilling to draw since *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) in which the civil right that was subject to being irretrievably lost was the right to procreate human life rather than the right to human life itself. The decision

of the courts below at least as applied to children of 20 weeks or more of gestational age, who are or may be live-born by an abortion and are capable of surviving with reasonable medical care, flies in the very teeth of this still strong precedent. The argument for preserving the life of unborn children who may be live-born and not merely those who are in fact live-born is also based upon the inherent unfairness of distinguishing situations that cannot reasonably be distinguished. Moreover, courts recognize that they can act to preserve their prospective jurisdiction, a doctrine that is logically applicable to unborn children capable of being live-born and of surviving so as to permit courts to preserve their prospective jurisdiction over them as citizens. *Cf., e.g., Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942).

5. THE REFUSAL OF THE COURT BELOW TO RULE THAT FATHERS OF THE UNBORN CHILDREN OF RESPONDENTS AND RESPONDENTS' CLASS WERE INDISPENSABLE PARTIES IN THIS ACTION RAISES IMPORTANT PROBLEMS CONCERNING CONTINUED MAINTENANCE OF THE FAMILY AS A BASIC SOCIETAL INSTITUTION: THE CONSTITUTIONAL RIGHTS OF FATHERS TO CARE FOR AND CONTROL THEIR UNBORN CHILDREN, TO EQUAL PROTECTION OF THE LAWS, AND TO PROCEDURAL DUE PROCESS UNDER THE

FIFTH AMENDMENT; AND, THE DOCTRINE OF STANDING AND ADMINISTRATION OF RULES 19 AND 24, F.R.C.P.

Petitioner unborn children in their pleading which was attached to their motion to intervene by their guardian alleged by way of defense that their fathers were indispensable parties to this action (Answer and Counter-claim of Child Doe, Child Roe and Child Smith, p. 1). Moreover, certain fathers of unborn children and certain husbands whose wives might at some time in the future be pregnant, all residents of Rhode Island, sought to intervene in this action on behalf of the fathers of the unborn children of respondents' class on the ground that these fathers were indispensable parties to this action (App. 689, 691). In their motion and attached pleading they alleged the same causes of action in behalf of their unborn children set forth in the pleading by their guardian as well as causes of action in their own behalf as fathers (App. 692, 703-715). Petitioners contended below that these fathers were indispensable parties because they had the constitutional right as parents to provide for the welfare of their children; and, the constitutional right to equal protection of the laws with respect to invoking the assistance of federal courts in exercising custody, care and control over their children (Petitioners' Appellate Brief, pp. 42-48).

The legislative history of the Thirteenth Amendment, the Civil Rights Act of 1866, and the

Fourteenth Amendment reveals that one of the most important purposes back of their proposal or adoption was to bring recognition and protection to the family relationship of those who had been slaves and to the personal rights of each member of the family. Many things outraged those who proposed these measures but mistreatment of the slave family and the total destruction of the rights of its members under the institution of slavery were especially galling to a people and their leaders still strongly committed to the family as the fundamental institution in a free political society. The classic phrase used by John A. Bingham, "blasphemy against the divine beauty of life," well characterizes the destruction which slavery wrought upon the slave father and "husband".[25] Senator Charles Sumner of Massachusetts considered that one of the essential features of the slavery system of his day was "the denial of the paternal relation."[26] The slave father's child was owned by the owner of its slave mother. The slave father had no control over the sale or seizure for debt of his child, including one who was in its mother's womb when the debt was contracted. The father could not marry so as to bring the protection of marriage and family law to his family. He could not claim his child as his own. He could not purchase land or a home for his family and could not insist upon his

[25] *Congressional Globe*, 37th Cong., 2d Sess. (March 12, 1862) p. 1203.
[26] *Congressional Globe*, 37th Cong., 2d Sess. (March 31, 1862) p. 1447.

family living with him. He could not purchase needed food and medicine for his children and wife. His only alternative was to steal the necessaries for them if not otherwise provided. He could not provide education for his children and was limited in giving them religious instruction. He could not sue in the courts to protect his wife and child or even testify against a person who had harmed them because neither he nor members of his family had any rights. His children were subject to correction and punishment by their master and he could not resist its infliction even when it was excessive. One Negro father after another observed and experienced the fact that slavery had

> "destroyed the sanctity of marriage, and sundered and broken the domestic ties, . . . bound men, women, and children, robbed them, beat them, bruised, and mangled them, burned and otherwise murdered them. . . . compelled them to submit in silence and labor in tears."[27]

After adoption of the Thirteenth Amendment, Senator Jacob M. Howard of Michigan reiterated the position that the Amendment not only broke the bond of slavery but in addition provided for the protection of fundamental civil rights of the free man who once had been or might again in practice be made a slave, saying:

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[27] *Congressional Globe*, 38th Cong., 1st Sess. (March 31, 1864) p. 1369. Also see, *Congressional Globe*, 37th Cong., 2d Sess. (March 25, 1862) pp. 1350-1352 (Senator Henry Wilson of Massachusetts); 38th Cong., 1st Sess. (April 6, 1864) (Senator James Harlan of Iowa), p. 1439.

> "Its intention was to make him the opposite of a slave, to make him a freeman. And what are the attributes of a freeman according to the universal understanding of the American people? Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word 'freeman' that does not include these ideas? The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?"[28]

One reason universally stated for enactment of the Civil Rights Act of 1866, which was based by its authors upon the authority of the Thirteenth Amendment, was that it provided the black father with the essential tools, including the right to sue and to testify, to protect his newly guaranteed right to have a family and to care for his children, among other basic civil rights.[29]

The refusal of the courts below to recognize that the fathers of the unborn children of respondents and respondents' class are indispensable parties to, and to allow certain fathers to intervene in this action in behalf of the former, destroys a fundamental right belonging to them as fathers who are freemen because it prevents them from protecting the lives of their

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[28] *Congressional Globe*, 39th Cong., 1st Sess. (January 30, 1866) p. 504 (Debate on Civil Rights Bill of 1866).

[29] *Congressional Globe*, 39th Cong., 1st Sess. (December 13, 1865) p. 43, (January 19, 1866) p. 322 (Senator Lyman Trumbull of Illnois).

children from being destroyed by their mothers through an abortion. The action of these courts in fact reduces them, in this respect, to the status of slaves of these wives and mothers contrary to the original purpose of the framers of the Thirteenth Amendment and the Fourteenth Amendment. Since this is accomplished by federal judicial action, the Due Process Clause of the Fifth Amendment is also violated.

This Court has long since recognized that the right of a parent to provide for the welfare of its child, including its religious training, "has a preferred position in our basic scheme" although it is subject to the interest of society and its regulation "that children be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens." *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 166-170). Also see, *Wisconsin* v. *Yoder*, 406 U.S. 204, 233-234 (1972). Federal courts should be especially solicitous to keep their doors open to parents, such as the fathers in this case, who seek as indispensable parties to intervene in an action to protect their children against the most ultimate abuse and indignity that can be visited upon them, destruction of their lives by their mothers who have rejected all responsibility for providing these children with loving care.

Moreover, in *Stanley* v. *Illinois*, 405 U.S. 645 (1972) this Court held recently that an unwed father of a child

he had raised was entitled to a hearing as a matter of procedural due process before the state could apply its Neglected or Dependent Children's Statute in a neglect proceeding so as to take away his child by a deceased mother for not providing it with adequate care. As Mr. Justice White stated in the opinion for this Court:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. . . .
>
> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '(r)ights far more precious than property rights,' . . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . and the Ninth Amendment. . . ." 405 U.S. at 651.

In this case, as contrasted with the father in *Stanley*, the fathers whom petitioners urged were indispensable parties faced no charge that they were not caring properly for their children. Like the father in *Stanley*, they seek to protect their constitutional right to care for and nurture their children. Unless they have the right to intervene as indispensable parties in an action such

as this to protect their children's lives, their basic civil right to conceive these children already exercised, which has as its only rational goal to produce, raise, care for, and nurture these children, is a snare and a delusion and the equivalent to no right at all. Similarly, the period of the child's life between conception and live birth must be protected or else the father's basic civil right to conceive and to raise, care for, and nurture the children he has sired are utterly meaningless. If Stanley had the basic civil rights to conceive and to raise his children that this Court said he had and that cannot be taken away from him by a state without a hearing, it would seem to follow necessarily that Stanley also had a basic civil right to protect his child's life between conception and birth in order to preserve the connection between his two basic rights and to obtain judicial assistance for this purpose. It is this constitutional right that the fathers who sought to intervene in this action as indispensable parties attempted to urge in defense of the lives of their children.

It is obvious that the District Court erred in ruling that the fathers' motion to intervene must be dismissed for lack of standing in light of the modern doctrine of standing outlined in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970) and the considerations presented above. The second ground, lack of jurisdiction, given by the District Court for refusing intervention by these

fathers was equally without merit in light of their valid claim to be indispensable parties. The failure of the District Court to join them is a defect so basic that it can be raised after trial and by the trial court itself or by an appellate court.[30]

6. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO WHETHER NOTICE TO ABSENT CLASS MEMBERS IS REQUIRED IN A CLASS ACTION BROUGHT UNDER SUBDIVISION (b)(2) OF RULE 23, F.R.C.P.; CONFLICTS WITH DECISIONS OF THE SUPREME COURT AS TO WHETHER THE UNBORN CHILDREN AND THEIR FATHERS, AS ABSENT PERSONS HAVING INTERESTS EXPOSED TO ADJUDICATION IN THE CLASS ACTION, WERE ENTITLED TO ADEQUATE REPRESENTATION, AND AN OPPORTUNITY TO BE HEARD, AS A MATTER OF DUE PROCESS UNDER THE FIFTH AMENDMENT; AND, THE FIRST CIRCUIT COURT OF APPEALS SO SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS, IN RULE 23 CLASS ACTIONS, AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

[30] *Moore's Federal Practice* (2d ed.) Vol. 3A, para. 19.19, pp. 2581-2582.

a. *The decision below, in not requiring notice to absent class members in this action, conflicts with decisions in that respect by other courts of appeal in class actions under subdivision (b)(2) of Rule 23, F.R.C.P.*

In not requiring notice to be given absent class members, the First Circuit and the district court ostensibly relied upon the interpretation heretofore given Rule 23 in that circuit, as announced in *Yaffee* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir., 1972):

> "Although notice to and therefore precise definition of the members of the suggested class are important to certification of a subdivision (b)(3) class, notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited."

The Fourth Circuit interprets Rule 23, F.R.C.P. in the same manner. *Hammond* v. *Powell*, 462 F2d 1053 (4th Cir., 1972). Three other Courts of Appeal have decided to the contrary, requiring some character of notice in every class action, including (b)(2) actions, as a matter of due process to be afforded absent class members. *Eisen* v. *Carlisle & Jacquelin*, 391 F2d 555 (2nd Cir., 1968); *Zeilstra* v. *Tarr*, 466 F2d 111 (6th Cir., 1972); *Schrader* v. *Selective Service System*, 470 F.2d 73 (7th Cir., 1972) *cert. denied*, 409 U.S. 1085 (1972). The decision of the district court also conflicts in principle with that of the United States Supreme Court in *Mullane* v. *Central Hanover B & T Co.*, 339 U.S. 306,

313 (1950) stating that at a minimum the Due Process Clause requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

b. *The decision below conflicts with decisions of the Supreme Court as to whether the unborn children and their fathers, as absent persons having interests exposed to adjudication in the class action, were entitled to adequate representation, and an opportunity to be heard, as a matter of due process under the Fifth Amendment.*

The district court denied the motion of the defendant Attorney General of Rhode Island seeking appointment of a guardian *ad litem* to represent the interests of the unborn children of plaintiffs and the suggested class of plaintiffs. Similarly, the district court denied a motion to intervene presented by the temporary guardian of the plaintiffs' children, which guardian was appointed by the appropriate Rhode Island state court. The district court denied the motion of fourteen Rhode Island men to intervene for themselves, as fathers of fetal children and husbands of women capable of bearing children; and, as representatives of a class comprised of fathers and husbands similarly situated.

In denying the attempted intervention of such men as well as that of the duly-appointed temporary

guardian of the plaintiffs' children, and in refusing to appoint a guardian *ad litem* to represent the personal interests of the plaintiffs' children and the children of the suggested class, the representation of the childrens' personal interest in this lawsuit fell by default to the childrens' natural guardians under law: their mothers, the plaintiffs. The plaintiffs opposed most malignantly the interests of those children. The actions of the district court were sustained in each instance by the First Circuit as either correct as a matter of law or within the district court's discretion. In the outcome, no one was allowed even to appear and argue the childrens' and fathers' personal interest in the threshold issue: were they entitled to be heard as persons possessed of rights exposed to adjudication in this action? The First Circuit explained its decision on the ground that the personal interests of the children and fathers were adequately represented by existing parties, a matter treated elsewhere in this petition.

The decision of the First Circuit conflicts with the decision of the United States Supreme Court in *McArthur* v. *Scott*, 113 US 340, 313 (1885), where the Court held necessary the appointment of a representative for the class composed of those "who might be born in the future and who could not be otherwise sufficiently represented." The decision of the First Circuit, as to the children and their fathers, conflicts also with the decision of the United States Supreme Court in *Hansberry* v. *Lee*, 311 US 32 (1940),

respecting diverse interests between representatives and the class they purport to represent:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far;" *Id.* at 45.

c. *The First Circuit Court of Appeals so sanctioned the district court's departure from the accepted and usual course of proceedings, in Rule 23 class actions, as to call for an exercise of the Supreme Court's power of supervision.*

The district court in this case utilized a procedural rule, Rule 23, F.R.C.P., in such a manner as to abridge and modify the substantive rights of persons interested in the litigation, indeed, persons having rights that were adjudicated in the action. Specifically, the district court abused Rule 23, F.R.C.P. in the following particulars:

(1) The court certified a class of plaintiffs with no notice whatsoever to anyone respecting the certification and the pendency of the action, denying absent persons due process of law in violation of the Fifth Amendment and violating section (d)(2) of Rule 23.

(2) The court certified the class of plaintiffs *after* trial on the merits when it filed its opinion in the case, in flagrant disregard of the requirement of Rule 23 (c)(1) that such be done as soon as practicable after commencement of the action.

(3) In violation of Rule 23, the court certified the class without a fact hearing as to whether there existed the prerequisites of a class action set forth in section (a) of that rule. Further, those facts were not even adduced at trial, as shown in the transcript of the proceedings.

(4) The court conducted the trial as a class action and ultimately certified the class though the claims of the purported representatives of the class were moot, as mentioned elsewhere in this petition, leaving no qualified class representative before the court.

7. THE DECISION BELOW RESPECTING THE NECESSITY OF A THREE-JUDGE DISTRICT COURT CONFLICTS WITH DECISIONS OF THE SUPREME COURT IN THAT RESPECT.

The decision of the courts below not to require a three-judge district court in this action conflicts with a decision of the Supreme Court in *Jeannette Rankin Brigade* v. *Chief of the Capitol Police*, 421 F.2d 1090 (D.C. Cir., 1972), *affirmed* 409 U.S. 972 (1972).

In this action, the district court ultimately certified a class of plaintiffs "composed of all women who are now or may hereafter be prevented from obtaining a legal (sic) abortion in Rhode Island because termination of their pregnancies is not necessary to preserve their lives." Shortly after learning, at the hearing on respondents' motion for temporary restraining order, April 4, 1973, that two plaintiffs had obtained abortions on or since filing their complaint on March 26, 1973 (App. 27), and learning that there was "some uncertainty about" the third plaintiffs appearing, who in fact did not appear at the hearing (App. 28, 46) nor at trial, the district court convened a conference between counsel for respondents and counsel for the Attorney General. Suggesting to those counsel that it would "facilitate a prompt hearing on the merits," the district court obtained the agreement of respondents to abandon their prayers for preliminary and permanent injunctions; and, obtained the agreement of counsel for the Attorney General, petitioner herein, to "respect and give full recognition to any declaratory judgment issued by this Court" (App. 130). By this affirmative action, outside the presence of counsel for the Committee, the district court sought to eliminate the necessity for confronting the statutory requirement of a three-judge district court, because, as it said, "I want to get on to the merits." (App. 49-51).

The same judgment that delimited the class declared the Rhode Island statute unconstitutional. The *res*

judicata effect of the judgment purports to be prospective and is co-extensive with all possible applications of the statute; and, the judgment is therefore equivalent in practical effect to an injunction against enforcement of the Rhode Island statute. The plaintiffs, by abandoning their prayer for injunctive relief, could not remove the action from the effect of 28 U.S.C. 2281.

The decisions below conflict with the decision of the Supreme Court in its affirmance of *Jeannette Rankin Brigade* where the court of appeals remanded the action for hearing before a three-judge court under 28 USC 2282, though the appellant had abandoned his prayer for injunctive relief, leaving only a declaratory action respecting the constitutionality of an act of Congress. Section 2282 of 28 USC involved in that action, and section 2281 involved in the present action, have the same purpose, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), creating a direct conflict in decision between the First Circuit and the Supreme Court. Because of the class-action aspect of the present action, it is more akin to an injunction in practical effect than was *Jeanette Rankin Brigade*, presenting an *a fortiori* situation in comparison.

In *Kennedy* v. *Mendoza-Martinez*, the Supreme Court expressly left open the issue of "Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a

three-judge court . . ." (372 US at 154). The affirmance on appeal in *Jeannette Rankin Brigade* was without opinion. The Supreme Court should now consider and deal at length with the important public issue of whether three judges or one will be required to consider the efforts of state legislatures in the areas left open to them by the Supreme Court's decisions in *Wade* and *Bolton*, as well as the numerous factual situations referred to but not presented in those opinions. As declaratory judgments are sought respecting the new statutes, they could indeed have a practical and restraining effect equivalent to an injunction, though such relief is not expressly sought, especially if those future actions are certified to be class actions. *Samuels* v. *Mackell* 401 US 66 (1971).

Whether the present cause presents a substantial constitutional issue, in view of the Supreme Court's decisions in *Wade* and *Bolton*, is treated elsewhere in this petition.

8. THE FAILURE OF THE LOWER COURTS TO DISMISS THIS ACTION OF MOMENTOUS IMPORTANCE TO THE PEOPLE OF RHODE ISLAND AND THE UNITED STATES, FOR ITS LACK OF EQUITABLE RIPENESS, CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The respondents, having obtained abortions shortly after filing their complaint and therefore presenting

only a hypothetical controversy, had no present need for an adjudication.

The action of the district court in this case conflicts directly with the decision of the Supreme Court in *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1947) regarding the speculative and contingent claims of the peitioners as to future pregnancies and their actual *need* for a declaration of their rights under the Rhode Island statute. The action of the district court conflicts directly with the decision of the Supreme Court in *Public Affairs Association* v. *Rickover*, 369 U.S. 111 (1962) regarding use of the declaratory judgment procedure where absent persons might contribute to the making of a full-bodied record suitable for declaratory judgment in an area of public concern. As pointed out by the Supreme Court in its opinion in those cases, the matter is one of "judicial discretion, exercised in the public interest," 369 U.S. at 112.

The district court, in the present action, abused its discretion. In its rulings on attempted interventions by the guardian and by the fathers and husbands, by its ruling on the appointment of a guardian *ad litem*, by refusing a motion for continuance to allow presentation of important evidence not otherwise available, and in other particulars set out elsewhere in this petition, the district court sought affirmatively to manage the proceedings and to limit the record in the case, thereby avoiding a decision on matters not presented in nor

decided in *Wade* and *Bolton*. The court then proceeded to declare the rights of Rhode Island citizens under the statute based upon the sparse record it had thus molded. The Supreme Court should reverse the judgments below. *Eccles* v. *Peoples Bank*, 333 U.S. at 435.

9. THE DISTRICT COURT'S REFUSAL TO HEAR ARGUMENT OR TO ALLOW PETITIONERS REASONABLE TIME TO PREPARE ARGUMENT RELATIVE TO CRUCIAL MOTIONS, SANCTIONED BY THE COURT OF APPEALS, CONFLICTS WITH DECISIONS OF THE SUPREME COURT CONCERNING THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

The petitioners seek the Supreme Court's writ of certiorari to present in reasonable and fair detail the matters complained of in the Court of Appeals relative to the district court's denial of an opportunity to argue petitioner's case in that court. Reliance is placed upon the Supreme Court's decisions in *Londoner* v. *Denver*, 210 U.S. 373 (1908) and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Petitioners will not, however, burden this petition by adding to its length but do preserve the question for presentation in their brief in the event certiorari is granted.

CONCLUSION

For the foregoing reasons, the petitioners, Richard J. Israel, the Constitutional Right to Life Committee of Rhode Island, and Ann Frank, as guardian of Child Doe, Child Roe, and Child Smith, respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

RICHARD J. ISRAEL,
Attorney General
W. SLATER ALLEN,
Assistant Attorney General
250 Benefit Street, Providence,
Rhode Island

FRANCIS J. BOYLE
112 Bellevue Avenue,
Newport, Rhode Island 02840

Of Counsel

JOSEPH P. WITHERSPOON
Townes Hall, 2500 Red River
Street, Austin, Texas 78705

Attorneys for Petitioners

APPENDIX A

APPENDIX A

C.A. NO. 5153

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

JANE DOE, MARY DOE AND SALLY SMITH,
PLAINTIFFS

versus

RICHARD ISRAEL, Attorney General, and
THE CONSTITUTIONAL RIGHT TO LIFE
COMMITTEE, Intervenor
DEFENDANTS

OPINION

May 16, 1973

PETTINE, *Chief Judge.* This action challenges the constitutionality of the abortion statute enacted by the Rhode Island legislature in March of 1973. Plaintiffs originally sought injunctive and declaratory relief against the Rhode Island Criminal Abortion Statute (73-S 287 Substitute "A"), R.I.G.L. §11-3-1 et seq.[1] The claim for injunctive relief has been dropped, and plaintiffs now seek only a declaration that this statute is unconstitutional.

Following the decisions by the United States Supreme Court in the abortion cases, *Roe* v. *Wade*, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973) and *Doe* v. *Bolton*, 41 U.S.L.W. 4233 (U.S. Jan. 22, 1973), a three-judge United States District Court declared unconstitutional the prior Rhode Island criminal abortion statute which had prohibited abortions except when necessary to preserve the life of the mother and which prohibited abortion counseling.[2] *Women of Rhode Island* v. *Israel*, C.A. No. 4605 (D.R.I. Feb. 7, 1973); *Rhode Island Abortion Counseling Service* v. *Israel*, C.A. No. 4586 (D.R.I. Feb. 7, 1973).

The present legislative product at isue is an attempt by the Rhode Island lawmakers to infuse constitutionality into its heretofore unconstitutional statute by declaring that human life begins at the moment of conception and that such life is a person

within the meaning of the Fourteenth Amendment to the United States Constitution.

Such legislative declarations, defendant argues, take the Rhode Island statute outside of the ambit of *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra*. The prologue to the law under question here recites that the United States Supreme Court acknowledged the appropriateness of state regulations in terminating pregnancy and safeguarding and protecting human life, and the non-absolute character of the right of privacy. The defendant's position is that the Supreme Court in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* never addressed the issues at stake in this controversy.

Plaintiffs sue on behalf of themselves and as representatives of the class of all other women similarly situated who are now or may hereafter be prevented from obtaining a legal abortion in Rhode Island because termination of their pregnancies is not necessary to preserve their lives.

Findings of Fact

Mary Roe, Jane Doe and Sally Smith, all United States citizens and residents of Rhode Island, testified or stated by affidavit that they were pregnant on March 26, 1973, the date on which this complaint was filed and that they desired to terminate their pregnancies in Rhode Island by a physician licensed in this state. Prior

to the court hearing of this case, Mary Roe, mother of eight children and Jane Doe, mother of two children, obtained abortions in New York. Mary Roe's abortion was performed on March 31, 1973. Jane Doe had completed her plans to go to New York on March 22, 1973, though her pregnancy was terminated after the commencement of this action. Sally Smith, did not appear at the trial. None needed to terminate her pregnancy to save her life.

Mrs. Ann Frank was appointed as guardian of the unborn children of the named plaintiffs by the Probate Court of the City of Providence in Rhode Island. In that capacity she sought to intervene urging jurisdiction of the unborn "children" pursuant to 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2284, and relying on 42 U.S.C.A. §1984. The motions of Ann Frank for intervention and for appointment as guadian ad litem were denied by this Court.

Three Rhode Island licensed physicians testified they would have performed abortions on certain of their patients except for the Rhode Island statute.

A number of learned authorities with impressive credentials in general obstetrical practice, surgery, perinatal physiology or fetal research testified for the defendant.[3] Exhaustively they gave their opinions as to when life commenced, detailing the commonly used methods of abortion, their varied and impressive

experiences with pre-natal life, anatomical recognition of the various members of aborted fetuses, practices used to identify each, and the physiological and psychological results on the mother. In short, they ran the gamut.

I neither summarize nor make any findings of fact as to their testimony. To me the United States Supreme Court made it unmistakably clear that the question of when life begins needed no resolution by the judiciary as it was not a question of fact. As will be discussed infra, I find it all irrelevant to the issues presented for adjudication.

Standing

Defendant contends that plaintiffs lack standing because "Jane Doe can go to neighboring states where her medical problems can be resolved" (Defendant's memorandum, p. 4) and because under the holding of *Boyle* v. *Landry*, 401 U.S. 77 (1971), and its companion cases, as defendant reads them, pregnant women who are not subject to criminal sanction for obtaining abortions are not proper plaintiffs to challenge criminal abortion statutes. Defendant also argues that plaintiffs have an adequate remedy at law.

In both *Roe* v. *Wade* and *Doe* v. *Bolton*, *supra*, the Supreme Court held that pregnant women who are thwarted by their state's criminal abortion laws have

presented a case or controversy and have standing to sue. In this case, as in *Roe* and *Doe, supra,* we have pregnant women "thwarted by the [Rhode Island] criminal abortion laws." The Attorney General of Rhode Island, defendant here, has unequivocally stated that violators (sic) of the abortion law will be subject to prosecution, and this threatened enforcement in itself has and will cause injury to plaintiffs and members of their class.

There are no meaningful factual differences nor legal reasons to cause this Court to depart from the unmistakable teachings of *Roe* v. *Wade, supra,* that plaintiffs have standing to sue. If the "adequate" remedy at law defendant refers to is monetary damages, it is nothing short of ludicrous to argue, as defendant apparently does, that monetary damages would be an adequate remedy to pregnant women who seek abortions. I hold that plaintiffs have standing to undertake this litigation and that they have presented a justiciable controversy.

Need for a Three-Judge Court

When an injunction is sought against the enforcement of a state statute on grounds of unconstitutionality, a three-judge district court is required under 28 U.S.C. §2281 and 2284. When as here, a declaratory judgment alone is sought against a state statute, the weight of authority is that a single

judge has jurisdiction to decide the claim. In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155 (1963), the Supreme Court found that on the facts of that case a single judge appropriately determined an action solely for declaratory relief, but declined to decide.

> "[W]hether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court." 372 U.S. 144, 154.

See also *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960).

The First Circuit Court of Appeals has read *Mendoza-Martinez* to allow a single judge to hear a claim for declaratory judgment where there is no claim for injunctive relief. *Merced Rosa* v. *Herrero*, 423 F.2d 591 (1st Cir. 1970).

However, dicta by the Supreme Court in *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971) that

> "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid"

complicated the matter. If declaratory and injunctive relief are to be equated in the doctrine that federal courts should not interfere with pending state criminal prosecutions, are they to be equated in terms of the

considerations which require the convening of a three-judge court? I think not. As has often been noted, the three-judge court statute should be strictly construed because of the burden it places on the federal judiciary. *Board of Regents* v. *New Left Education Project*, 404 U.S. 541 (1972). Moreover, the Supreme Court recently affirmed the constitutionality of a state statute without discussion of three-judge court jurisdiction where a single judge had issued declaratory relief, which was the only relief requested, against the statute and had been reversed by a court of appeals. *Rosario* v. *Rockefeller*, 41 U.S.L.W. 4401 (March 21, 1973). This Court finds that it may proceed as a single-judge Court to determine the merits of this claim for declaratory relief.

Plaintiffs have urged upon this Court another doctrine that would support consideration of this matter by a single judge. *Bailey* v. *Patterson*, 369 U.S. 31 (1962) and *Turner* v. *City of Memphis*, 369 U.S. 350 (1962) hold that when prior decisions make unsubstantial or frivolous any claim that a state statute on its face is not unconstitutional, a three-judge court is not required. In *Bailey, supra*, at p. 33, the Supreme Court stated:

> "We hold that three judges are . . . not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional. . . . The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge

requirement—that a single judge ought not to be empowered to invalidate a state statute under a federal claim—does not apply.

The three-judge requirement is a technical one to be narrowly construed, *Phillips* v. *United States*, 312 U.S. 246, 251, 61 S. Ct. 480, 483, 85 L. Ed. 800. The statute comes into play only when an injunction is sought 'upon the ground of the unconstitutionality' of a statute. There is no such ground when the constitutional issue presented is essentially fictitious."

Consideration of the *Bailey* and *Turner* doctrine necessarily leads into the merits of this controversy.

Conclusions of Law

Can it be said that the decisions of the Supreme Court in *Roe* v. *Wade* and *Doe* v. *Bolton* make frivolous any claim that the Rhode Island criminal abortion statute on its face is not unconstitutional? Is the constitutional defense presented here "essentially fictitious?"

With due respect and in no way meaning to mitigate the sensitive and consuming nature of the abortion controversy, I am constrained to answer both questions in the affirmative. For reasons hereinafter stated, I find the statute to be unconstitutional.

Defendant and intervenors have raised two principal and interrelated arguments in defense of this statute. It

is first argued that the state legislature has found that life begins at conception and has protected this life from homicide. Secondly, it is argued that the state legislature has declared a fetus to be a "person" within the meaning of the Fourteenth Amendment to the United States Constitution and that this legislative declaration is binding on this Court. Both arguments are insufficient.

The Rhode Island legislature apparently read the opinion of the Supreme Court in *Roe* v. *Wade* to leave open the question of when life begins and the constitutional consequences thereof. This is a misreading of the opinions of the Supreme Court in *Roe* v. *Wade* and *Doe* v. *Bolton*.

It is apparent from the opinion in *Roe* that the argument that life begins at the instant of conception and that the taking of this fetal life would be homicide was raised by the parties and amici before the Supreme Court and that the Supreme Court considered this argument in reaching its decision. A reading of the opinion as a whole can result in no other conclusion. Moreover, there are numerous specific indications that this argument was raised and considered.

First, the Texas statute found to be unconstitutional in *Roe* had previously been found to be constitutional by a Texas court on the grounds, in part, that the Texas statute implicitly recognized human life prior to actual

birth and that the definition of human life was for the legislature and not the courts. 41 U.S.L.W. at 4215. Second, the court went to great lengths to detail the history of attitudes and laws about abortions, including varous concepts of when life begins. 41 U.S.L.W. at 4218-4223. Third, the argument was specifically addressed at 41 U.S.L.W. at 4224, where the court declined to accept Texas' argument that the State's interest was defined by the "fact" that life began at the moment of conception and instead recognized that the State's interest was in the protection of potential life.[4] Fourth, the court held, in the face of the argument that life begins at conception, that a fetus is not a person within the meaning of the Fourteenth Amendment, 41 U.S.L.W. at 4226-4228. Lastly, the court noted that those in medicine, philosophy, and theology had been unable to agree on when life began and that, in any event, the law has never recognized a fetus as a person in the whole sense. 41 U.S.L.W. at 4227-4228.

The circumstance that the argument presented to and rejected by the Supreme Court in *Roe* is presented again in the guise of a "factual" declaration by the Rhode Island legislature does not change the result in *Roe* or the obvious applicability of *Roe* here. The state through the passage of legislation, cannot establish a presumption which violates the constitutional rights of the persons affected by such laws, as the women of Rhode Island are affected here. *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971);

Carrington v. *Rash*, 380 U.S. 89 (1965); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

As the Supreme Court stated in *Roe*, 41 U.S.L.W. at 4228:

> "[W]*e do not agree that, by adopting one theory of life* [*the state*] *may override the rights of the pregnant woman that are at stake.* We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and it has still another important interest in protecting the *potentiality* of human life." (emphasis added)

A further indication that the issue has been conclusively determined against these Rhode Island statutes is given by the post-*Roe* action of the unanimous Supreme Court in refusing to consider its remand of the Connecticut abortion cases for further consideration in light of *Roe* and *Doe*[5] and in dismissing the appeal for want of a substantial federal question in *Byrn* v. *New York City Health & Hospital Corp.*[6]

Nor does the Rhode Island legislature have the power to determine what is a "person" within the meaning of the Fourteenth Amendment. Such a question is purely a question of law for the courts, independent of any power in the state legislature to create evidentiary presumptions. It has always been the Supreme Court that has given content to the term "person" under the Fourteenth Amendment. The argument of intervenors

pointing to Supreme Court decisions based on state recognized interests in property misses the point that the Supreme Court exercises an ultimate, independent judgment about what "property" is property for purposes of constitutional protection. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Municipal Investors Assn.* v. *Birmingham*, 316 U.S. 153 (1942); *Indiana ex rel. Brand* v. *Anderson*, 303 U.S. 95 (1938). Furthermore, as amicus curiae has argued,[7] while the States have traditionally established a network of property and contract rights, they have not done so as to life, liberty or person. There is little reason to accept or give determinative weight to varying state versions of the existence or character of the rights at stake. Such issues are exclusively questions of Federal constitutional law. See *Griswold* v. *Connecticut*, 504 U.S. 479 (1965).

The Supreme Court has held in *Roe* v. *Wade* that a fetus is not a "person" within the meaning of the Fourteenth Amendment. As amicus to this Court, Professor Thomas I. Emerson, has so well stated, "Clearly the Federal courts must reserve ultimate authority to say what the meaning of the Fourteenth Amendment is. Surely the States could not, by legislative or judicial fiat, overturn the *Dartmouth College* case, 4 Wheat. 518 (1819), by finding that a charter was not a 'contract'; or overturn *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), by finding that the right to welfare benefits was not 'property'; or overturn *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), by finding that

the right of parents to send their children to private school was not a 'liberty'; or overturn *Brown* v. *Board of Education*, 347 U.S. 483 (1954), by finding that black children were not 'persons'. If a Federal Constitution is to exist, these decisions must be made by the Federal courts."

It is sheer sophistry to argue as the defendant does that *Roe* v. *Wade* and *Doe* v. *Bolton* can be nullified by the simple device of a legislative declaration or presumptions contrary to the court's holding. Indeed it is a surprising attempt by one independent branch of government to invade and assume the role of the other. The right of a state to declare an entity does not carry with it the judicial prerogative to determine the constitutional status of such entity.

Finally, it must be said that the Supreme Court having ruled on this issue, its judgment is the law of this land. Under our scheme of government, it is the Supreme Court, not state legislatures, that ultimately determines the meaning of constitutional guarantees. *Marbury* v. *Madison*, 1 Cranch 137 (U.S. 1803); *McCulloch* v. *Maryland*, 4 Wheat. 316 (U.S. 1819).

Because R.I.G.L. §11-3-1 which prohibits the procuring, the counseling or attempting a miscarriage except when necessary to preserve the woman's life cannot survive a constitutional attack, §11-3-2 and §11-3-3, being integrally interwoven with it, must also

fall. It is clear that the "conclusive presumption" of §11-3-4 is also foreclosed by *Roe* and that §11-3-4 must fall. Section 11-3-5, the savings clause, having nothing to operate upon, it too must be void.

Plaintiffs have moved that this be certified as a class action. The class is properly composed of all women who are now or may hereafter be prevented from obtaining a legal abortion in Rhode Island because termination of their pregnancies is not necessary to preserve their lives. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Defendant has acted on grounds generally applicable to the class, thereby making appropriate declaratory relief to the class as a whole. Fed. R. Civ. P. 23(b)(2). This shall be certified as a class action.

Defendant, the Attorney General of Rhode Island, has represented to the Court that he will respect a declaratory judgment rendered against this criminal abortion statute and, should it be declared unconstitutional, not commence prosecutions under it.

It is hereby declared, adjudged, and decreed that the Rhode Island criminal abortion statute, R.I.G.L. §11-3-1; 11-3-2; 11-3-3; 11-3-4; and 11-3-5 (73-S 287

Substitute A) is on its face in violation of the Constitution of the United States.

(s) RAYMOND J. PETTINE
Chief Judge
, 1973

FOOTNOTES

[1] The statute in toto reads: (the statute is reproduced elsewhere in the petition and is here omitted)

[2] (No footnote 2 in the original)

[3] Plaintiffs did not introduce medical testimony, feeling that the decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* decided the issue and made all medical testimony irrelevant.

[4] The court, by giving recognition to the "less rigid" claim of a legitimate state interest on potential life, did not leave it open to states to re-assert the more rigid claim based on conception as the commencement of life. Rather, the Supreme Court rejected an inflexible analysis on its evaluation of state interests which would hinge on the acceptance or non-acceptance of the theory that human life begins at conception. In effect, the court lessened the burden of justification of the criminal abortion statutes. "Life" at conception did not have to be shown. The "potentiality" of life was sufficient to sustain the claim of the interests of the state beyond the protection of the mother. The ultimate holding of the Supreme Court in *Roe* v. *Wade* defined the parameters of these state interests and in doing so rejected the theory that the state's interests are "compelling" in the first trimester. The court weighed the state's interest during the first trimester in protecting the potentiality of human life and in safeguarding the health of the pregnant woman which in the light of history is not on delicate balance until after such period. In this first phase of pregnancy, the court held that the state, by adopting one theory of life, cannot override the constitutional right of privacy of the pregnant woman. In the second trimester, the court held that the state, in the promotion of the health of the mother, might regulate the abortion procedure. Only in the last trimester was it held that the state's

interest in the potentiality of human life became compelling to the extent that the state might proscribe abortions where not necessary to save the life of the mother.

[5] 41 U.S.L.W. 3554 (U.S. April 16, 1973). In the first *Abele* v. *Markle*, 342 F. Supp. 800 (D. Conn. 1972), a three-judge federal district court found unconstitutional a Connecticut statute which prohibited all abortions unless necessary to preserve the life of the mother or the fetus. One judge dissented, finding the purpose of the statute to be the protection of fetal life. Following this decision, the Connecticut legislature passed a new abortion statute which was the same as the original except that it declared it was the intent of the legislature to protect human life from the moment of conception. A second case was brought challenging the constitutionality of the new statute. In *Abele* v. *Markle*, 351 F. Supp. 224 (D. Conn. Sept. 20, 1972), the three-judge court, one judge dissenting, held the new statute unconstitutional saying the State had *no* compelling interest in preserving fetal life in view of the widely differing views about the nature of that life. On February 26, 1973, the Supreme Court vacated the appeal in the first *Abele* case as moot and vacated and remanded the second *Abele* case to the district court for reconsideration in light of *Roe* v. *Wade* and *Doe* v. *Bolton*, 41 U.S.L.W. 3462 (U.S. Feb. 26, 1973). Connecticut asked the Supreme Court to reconsider this ruling, arguing that the evidence it had presented demonstrated that a fetus is a human being from the time of conception. The Supreme Court refused to reconsider its ruling that the Connecticut statute should be considered in light of *Roe* v. *Wade*, 41 U.S.L.W. 3554.

On remand, a now unanimous three-judge court declared the Connecticut statute unconstitutional and enjoined its enforcement. *Abele* v. *Markle* (D. Conn. April 26, 1973).

[6] 41 U.S.L.W. 3459 (U.S. Feb. 26, 1973). *Byrn* involved an attempt to invalidate New York's liberalized abortion law by arguing a fetus was a person within the meaning of the Fourteenth Amendment.

[7] The Court would like to express its appreciation to Professor Thomas I. Emerson of the Yale Law School for his able assistance as amicus to the Court on this matter. Professor Emerson participated as amicus with the consent of all parties.

JUDGMENT

It is hereby declared, adjudged, and decreed that the Rhode Island Criminal Abortion Statute, R.I.G.L. §§11-3-1; 11-3-2; 11-3-3; 11-3-4; and 11-3-5 (73-S 287 Substitute A) is on its face in violation of the Constitution of the United States. The plaintiffs' request for attorneys fees is denied without prejudice subject to reconsideration on completion of the appellate process in this matter. Plaintiffs are allowed their costs.

By Order,
(s) JOHN A. McQUEENEY
Clerk

Enter:
(s) RAYMOND J. PETTINE
Chief Judge
May 16, 1973

United States Court of Appeals

For the First Circuit

No. 73-1177.

JANE DOE ET AL.,
PLAINTIFFS, APPELLEES,

v.

RICHARD J. ISRAEL ETC.,
DEFENDANT, APPELLANT.

No. 73-1178.

JANE DOE ET AL.,
PLAINTIFFS, APPELLEES,

v.

RICHARD J. ISRAEL ETC.,
DEFENDANT, APPELLEE,

CONSTITUTIONAL RIGHT TO LIFE COMMITTEE,
INTERVENOR, APPELLANT.

No. 73-1184.

JANE DOE ET AL.,
PLAINTIFFS, APPELLEES,

v.

RICHARD J. ISRAEL ETC.,
DEFENDANT, APPELLEE,

ANN FRANK,
DEFENDANT, APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

MEMORANDUM AND ORDER

Entered November 14, 1973

Following the decisions in *Roe* v. *Wade*, 1973, 410 U.S. 113, and *Doe* v. *Bolton*, 1973, 410 U.S. 179, the district court for the District of Rhode Island declared Rhode Island's so-called anti-abortion statute, R.I.Gen. Laws §§11-3-1 *et seq.*, to be unconstitutional. Thereafter, the legislature amended the statute. (Same citation, as amended 1973.) Rather than an attempt to bring the statute within the limits outlined by the Supreme Court as open to state regulation, the amendments consisted chiefly of a preamble, or recital, declaring a fetus to occupy a constitutional status directly conflicting with the Court's conclusions. Two married women,* residents of Rhode Island, and pregnant less than twelve weeks, thereupon asked the district court for a judgment declaring the unconstitutionality of the new statute. Named as defendant was the Rhode Island Attorney General in his official capacity. The Constitutional Right to Life Committee, a Rhode Island non-business corporation constituted for the purpose, inter alia, of "[r]esistance to all attempts at liberalizing the existing abortion laws," was allowed to intervene as a party defendant. The court granted the requested relief, and defendants appeal, as do certain other would-be intervenors.

* A third plaintiff was named on the complaint, but did not participate further in the action.

We appreciate, as did the Supreme Court, the sincerity and depth of the views of protagonists on this important issue. It should be manifest, however, that we cannot be receptive to defendants' substantive arguments, which merely reiterate, reinforce or restate contentions unequivocally rejected by the Court. If the Court wishes to reconsider, that is for it to decide.

Much of defendants' brief and oral argument was devoted to subsidiary matters; allegations that plaintiffs lack standing because, after instituting the action, they had obtained abortions (legally) outside of the state, and that the court should have appointed a guardian ad litem for plaintiffs' fetuses and allowed further interventions. With this we will deal briefly.

Whatever justification defendants may believe they have for seeking to relitigate substantive matters, we can think of none for attacking the minor one of plaintiffs' standing, so fully considered in *Roe* v. *Wade*, ante, 410 U.S. at 125. Even if the question were open, the contention that plaintiffs should have to come to term in order to obtain a declaration of their right not to, seems reminiscent of the procedure under which persons wishing to avoid execution for witchcraft could establish their innocence by drowning.

As to guardianship, whether the Court's reasoning as to plaintiffs' continued standing despite termination of their pregnant status would similarly warrant

recognition of the interests of a fetus which, for one reason or another, will no longer be in existence, at least qua fetus, by the end of this litigation, we need not determine. It is quite apparent that in the present case the interests sought to be protected by a guardian were fully represented by the existing parties defendant. *Cf.* F.R.Civ.P. 24 (a)(2). The court's rulings as to this and certain proposed interventions were either correct as a matter of law, or were within its discretion.

The judgment of the district court is affirmed. Costs to plaintiffs-appellees in No. 73-1177. No other costs.

By the Court:

Clerk.

APPENDIX B

1. The constitutional provisions involved in this case are:.

Article III, Section 2 of the Constitution of the United States:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ."

Amendment Five to the Constitution of the United States:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment Nine to the Constitution of the United States:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people."

Amendment Thirteen to the Constitution of the United States:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime

whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Amendment Fourteen to the Constitution of the United States:

"Section 1. All perons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. The statutes involved in this case are:

18 U.S.C., §241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C., §1584. Sale into involuntary servitude

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773.

28 U.S.C. 2201 Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes,

any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, §12(p), 72 Stat. 349.

28 U.S.C. 2281 Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. 2282 Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

42 U.S.C., §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., §1985. Conspiracy to interfere with civil rights — Preventing officer from performing duties

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway

or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one of more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having

jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Rhode Island General Laws, 11-3-1 et seq., (73-S 287, Substitute A)

AN ACT Relating to Abortions.

PREAMBLE

Whereas, The supreme court of the United States on January 22, 1973, recognized and acknowledged that state regulation is appropriate in any decisions to terminate pregnancy; and

Whereas, Said court found that a state may properly assert its interests in safeguarding life, in maintaining medical standards, and in protecting life in the proper exercise of its governmental functions; and

Whereas, Any right of privacy regarding decisions to terminate pregnancy is not an absolute right and must be considered in the light of important state interests in the regulation of such decisions; and

Whereas, The state of Rhode Island has a legitimate and important interest in preserving and protecting the life of pregnant women and in protecting all human life; and

Whereas, The state of Rhode Island, in its fulfillment of its legitimate function of protecting the well-being of all persons within its borders, hereby declares that in the furtherance of the public policy of said state, human life and, in fact, a person within the language and meaning of the fourteenth amendment to the constitution of the United States, commences to exist at the instant of conception; now, therefore,

It is enacted by the General Assembly as follows:

Section 1. Chapter 11-3 of the general laws entitled "Abortion" is hereby repealed in its entirety.

Sec. 2. Title 11 of the general laws entitled "Criminal offenses" is hereby amended by adding thereto the following chapter:

"CHAPTER 3
"Abortion

"11-3-1. PROCURING, COUNSELING OR ATTEMPTING MISCARRIAGE. — Every person who, with the intent to procure the miscarriage of

any pregnant woman or woman supposed to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever or shall aid, assist or counsel any person so intending to procure a miscarriage, shall if the woman die in consequence thereof, be imprisoned not exceeding twenty (20) years nor less than five (5) years, and if she does not die in consequence thereof, shall be imprisoned not exceeding seven (7) years nor less than one (1) year; provided that the woman whose miscarriage shall have been caused or attempted shall not be liable to the penalties prescribed by this section.

"11-3-2. MURDER CHARGED IN SAME INDICTMENT. — Any person who shall be indicted for the murder of any infant child, or of any pregnant woman, or of any woman supposed by such person to be or to have been pregnant, may also be charged in the same indictment with any or all the offenses mentioned in section 11-3-1, and if the jury shall acquit such person on the charge of murder and find him guilty of the other offenses or either of them, judgment and sentence may be awarded against him accordingly.

"11-3-3. DYING DECLARATIONS ADMISSIBLE. — In prosecutions for any of the offenses described in section 11-3-1, in which the

death of a woman is alleged to have resulted from the means therein described, dying declarations of the deceased woman shall be admissible as evidence, as in homicide cases.

"11-3-4. CONSTRUCTION AND APPLICATION OF SECTION 11-3-1. — It shall be conclusively presumed in any action concerning the construction, application or validity of section 11-3-1, that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the constitution of the United States, and that miscarriage at any time after the instant of conception caused by the administration of any poison or other noxious thing or the use of any instrument or other means shall be a violation of said section 11-3-1, unless the same be necessary to preserve the life of a woman who is pregnant.

"11-3-5. CONSTITUTIONALITY. — If any part, clause or section of this act shall be declared invalid or unconstitutional by a court of competent jurisdiction, the validity of the remaining provisions, parts or sections shall not be affected."

Sec. 3. This act shall take effect upon passage.

EXPLANATION

By the Legislative Council

This act repeals the existing chapter dealing with abortions.

It enacts a new chapter on abortions and adds the legislative determination that human life and a person within the language and meaning of the fourteenth amendment to the constitution of the United States commences at the instant of conception.

Rhode Island General Laws, 11-9-5

Cruelty to or neglect of child. — Every person having the custody or control of any child under the age of eighteen (18) years who shall abandon such child, or who shall treat such child with gross and habitual cruelty, . . . or who shall use or permit the use of such child for any wanton, cruel or improper purpose, or who by reason of neglect, cruelty, drunkenness or depravity, shall render the home of such child a place in which it is unfit for such child to live, shall be guilty of a misdemeanor and shall for every offense be imprisoned not exceeding one (1) year or be fined not exceeding two hundred fifty dollars ($250), or be both fined and imprisoned as aforesaid, and such child may be proceeded against as a neglected child under the provisions of chapter 1 of title 14.

Rhode Island General Laws, 14-1-1 et seq.

14-1-1. Short title. — This chapter shall be known and may be designated as "The family court act."

14-1-2. Purpose of chapter. — The purpose of this chapter is to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; to conserve and strengthen the child's family ties wherever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

* * * * *

14-1-5. Exclusive jurisdiction of court. — The court shall, as hereinafter set forth, have exclusive original jurisdiction in proceedings.

A. Concerning any child residing or being within the state who is (1) delinquent, (2) wayward, (3) dependent, (4) neglected, or (5) mentally defective or mentally disordered.

B. Concerning adoption of children.

C. To determine the paternity of any child alleged to have been born out of wedlock and to provide for the support and disposition of such child in case such child or its mother has residence within the state.

D. Relating to child marriages, as prescribed by § 15-2-11.

E. Referred to the court in accordance with the provisions of §13-1-28.

Rhode Island General Laws, 8-10-3

Establishment of court —Jurisdiction —Seal — Oaths. — There is hereby established a family court, consisting of a chief judge and four (4) associate justices, to hear and determine all . . . those matters relating to delinquent, wayward, dependent, neglected or mentally defective or mentally disordered children;

Rhode Island General Laws, 8-10-43

References to family court —Powers and duties. —

In addition to the powers and authority specifically granted in this act, the justices of the

family court shall have, insofar as they are applicable, the same obligations and duties as superior court justices, and in all matters within the jurisdiction of said court shall be vested with all of the prerogatives and authority of associate justices of the superior court.

Rhode Island General Laws:

14-1-6. Retention of jurisdiction. — When jurisdiction shall have been obtained by the court in the case of any child, such child shall, except as herein otherwise specifically provided, continue under the jurisdiction of the court until he becomes twenty-one (21) years of age, unless discharged prior thereto; provided, however, that nothing herein contained shall affect the jurisdiction of other courts over offenses committed by such child after he reaches the age of eighteen (18).

* * * * *

14-1-10. Preliminary investigation on information furnished to court. — Whenever any appropriate person shall give to the court information in his possession that a child is within the provisions of this chapter, it shall be the duty of the court to make preliminary investigation to determine whether the interests of the public or of the child require that further action be taken, and

to report its findings together with a statement of the facts to the judge. . . .

14-1-11. Authorizing and filing petition. — If a justice of the family court shall determine that such formal jurisdiction should be acquired he shall authorize a petition to be filed. . . . Said petition shall be directed to the family court of the state of Rhode Island, setting forth that in the opinion of the petitioner such child is a delinquent, wayward, dependent or neglected child, or otherwise comes within the provisions of this chapter, as the case may be, and requires the care and protection of the state, and such petition shall be sworn to before either justice or clerk of the family court.

* * * * *

14-1-29. Times and places of hearings. — The court shall designate suitable times and places for the hearing of all matters arising within its jurisdiction and may sit at such other times and places within the state as to such court may seem best adapted to the carrying out of the purposes of this chapter. . . .

* * * * *

14-1-32. Power of court to order disposition of child. — If the court shall find that a child is

delinquent, wayward, neglected, dependent or otherwise within the provisions of this chapter, it may by order duly entered proceed as follows:

Place the child on probation or under supervision in his own home or in the custody of a relative or other suitable person, or in the custody of any of the agencies, societies or institutions under the control of or approved by the department of social welfare, upon such terms as the court shall determine.

Rhode Island General Laws, 23-51-1

Consent to medical and surgical care. — Any person of the age of sixteen (16) or over or married, may consent to routine emergency medical or surgical care. A minor parent may consent to treatment of his child.

Federal Rules of Civil Procedure:

Rule 17(c) Parties Plaintiff and Defendant; Capacity.

* * * * *

INFANTS OR INCOMPETENT PERSONS. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the

representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 19 Joinder of Persons Needed for Just Adjudication.

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may

be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

* * * * *

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

Rule 23. Class Actions.

(a) PREREQUISITIES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other

members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine byorder whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion, and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed,

and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the

action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

* * * * *

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties

as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., §2403.

MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1229

RICHARD J. ISRAEL, *et al.*,

Petitioners,

—v.—

JANE DOE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

RICHARD W. ZACKS
915 Hospital Trust Bldg.
Providence, R. I. 02903

CHARLES G. EDWARDS
1109 Hospital Trust Bldg.
Providence, R. I. 02903

NANCY STEARNS
Center For Constitutional Rights
853 Broadway
New York, N. Y. 10003

JANICE GOODMAN
BELLAMY, BLANK, GOODMAN, KELLY, ROSS & STANLEY
36 W. 44th Street
New York, N. Y. 10036

Attorneys for Respondents

MELVIN L. WULF
JUDITH MEARS
American Civil Liberties Union
22 E. 40th Street
New York, N. Y. 10016
of Counsel

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RICHARD J. ISRAEL, *et al.*,

Petitioners,

—v.—

JANE DOE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Questions Presented

1. Whether the court below was correct in ruling that Rhode Island's amended abortion statute, R. I. General Laws §§11-3-1 through 11-3-5 is unconstitutional under the rulings of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973)?

2. Whether the procedural rulings of the court below constituted a sound exercise of its judicial discretion and whether any possible alleged errors were in fact harmless?

Statement of the Case

Following the decisions of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), the United States District Court for the District of Rhode Island declared unconstitutional the Rhode Island statute, R. I. General Laws §11-3-1 *et seq.*, which prohibited all abortions except those necessary to preserve the life of the mother. *Women of Rhode Island* v. *Israel*, C.A. No. 4605 (D.R.I. February 7, 1973); *Rhode Island Abortion Counseling Service* v. *Israel*, C.A. No. 4586 (D.R.I. February 7, 1973).

Thereafter, the Rhode Island legislature re-enacted the same statute adding only a declaration that a fetus, from the moment of conception, is "a person within the language and meaning of the Fourteenth Amendment to the Constitution of the United States." R. I. General Laws §11-3-1 *et seq.* (as amended, 1973). The new statute, like its unconstitutional predecessor, prohibits at every stage of pregnancy all abortions except those necessary to preserve the life of the woman.

As a result of this new impediment to obtaining a legal abortion in Rhode Island, plaintiffs, pregnant women seeking legal abortions in Rhode Island, initiated this action to challenge the constitutionality of the rewritten restrictive statute.

A motion to intervene or to appear as *amicus curiae* was made by the Constitutional Right to Life Committee. The Committee was then permitted to proceed throughout as though it was a party.

A second motion to intervene as *guardian ad litem* for fetuses was made by Anne Frank. That motion was denied. In denying Ms. Frank's motion the trial court noted that she was represented by the same counsel as the Constitutional Right to Life Committee.

Plaintiffs' motion for a preliminary injunction was denied by United States District Judge Raymond J. Pettine, on April 4, 1973.

On April 9, 1973, the trial court entered an Order which was consented to by counsel for plaintiffs and defendant whereby plaintiffs' request for injunctive relief was withdrawn in light of the agreement by the State that it would abide by any declaratory judgment issued by the Court. The order set the matter down for trial before Judge Pettine on April 12, 1973.

Following a full evidentiary hearing, Judge Pettine held the Rhode Island abortion statute unconstitutional on May 16, 1973.

On May 17, 1973, appellants filed Notice of Appeal and on May 22, 1973 applied to the United States Court of Appeals for the First Circuit, *ex parte,* for a temporary stay of the judgment below. That stay was granted on May 23, 1973 pending argument which was set for June 5, 1973. On June 6, 1973, following full argument, the Court of Appeals denied appellants' motion for a stay pending appeal and terminated the emergency stay previously granted.

Still two weeks later, and a full five weeks after the entry of final judgment by the District Court, Gary Brennan, *et al.,* applied to the District Court to intervene

on behalf of fathers and potential fathers of fetuses. On July 5, 1973, that motion was denied by the District Court.

On November 14, 1973, the Court of Appeals affirmed the judgment of the district court holding the Rhode Island statute unconstitutional under *Roe* v. *Wade, supra* and *Doe* v. *Bolton, supra.* It is that decision which is appealed from herein.

ARGUMENT

1. Both the Court of Appeals and the District Court were correct in holding that this case is controlled by *Roe* v. *Wade* and *Doe* v. *Bolton.*

The Rhode Island abortion statute challenged herein bars all abortions except those which are necessary to preserve the life of the pregnant woman. In holding that statute unconstitutional the District Court termed "frivolous" the effort of the Petitioners to distinguish the statute herein from that in *Roe* v. *Wade.* The Court of Appeals below concluded that Petitioners' substantive arguments "merely reiterate, reinforce or restate contentions unequivocally rejected by the [Supreme] Court." Petitioners' Appendix A, p. 91.

This Court set forth with painstaking care in *Roe* v. *Wade* the standards which were to be applied by courts and legislatures in determining whether a restrictive abortion statute is constitutional. Those standards were flatly ignored by the Rhode Island legislature. The statute herein, R. I. General Laws §11-3-1 *et seq.*, is nothing but the Texas statute declared invalid in *Roe* v. *Wade* with a preamble and declaration purporting to create a statutory

presumption that a fetus is a person from the moment of conception and as such is entitled to the protection of the Fourteenth Amendment. In re-enacting its prior unconstitutional statute, the Rhode Island legislature either ignored, or attempted to negate, the express ruling of this Court in *Roe* v. *Wade, supra,* that a fetus is not a "person" within the language and meaning of the Fourteenth Amendment. The Court below was correct in holding that Rhode Island cannot avoid the ruling of this Court merely by adopting as law a theory that life begins at the moment of conception. For as this Court stated in *Roe* v. *Wade*:

> "We do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Roe* v. *Wade, supra* at 731.

This case is plainly controlled by *Roe* and *Doe* as this Court demonstrated in its handling of a virtually identical case which arose in the neighboring state of Connecticut. There, after a three judge federal court struck down a restrictive abortion statute which had been amended by the addition of a preamble such as that herein, this Court summarily remanded the case for action consistent with *Roe* and *Doe,* and denied the State's petition for rehearing which raised the same constitutional arguments raised by Petitioners herein. *Markle* v. *Abele,* 93 S. Ct. 1439 (1973), rehearing denied 93 S. Ct. 1888 (1973).[1] On remand, the District Court reaffirmed its earlier finding of unconstitutionality. *Abele* v. *Markle,* Civ. No. B-521 (April 26, 1973).

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[1] *Abele,* like this case, developed when the Connecticut Legislature sought to evade the rulings of the federal court which had just held its Texas-type abortion statute unconstitutional, *Abele* v. *Markle,* 351 F. Supp. 224 (D. Conn., 1972), by amending the statute to add a preamble declaring that life begins at conception.

See also *Byrn* v. *New York City Health & Hospital Corp.*, 410 U.S. 949 (1973), in which this Court citing *Roe* v. *Wade, supra,* dismissed for want of a substantial question an appeal raising the same constitutional claims raised herein. More recently, on March 26, 1974, this Court denied *certiorari* in *Kugler* v. *Young Women's Christian Association of Princeton, New Jersey* (No. 73-838) where, as in this case, the Petitioners sought to have this Court reconsider its rulings in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra.*

The challenged Rhode Island statute prohibits all abortions except those which are necessary to preserve the life of the pregnant woman. *Roe* v. *Wade, supra,* holds that such a statute is unconstitutional. Petitioners' substantive arguments in support of the statute have all been presented to and rejected by this Court in *Roe* and related cases such as *Markle, Byrn,* and *Kugler.* Therefore, the Petition for a Writ of Certiorari should be denied.

2. The procedural rulings complained of by Petitioners were not erroneous and any possible alleged error was harmless.

In a tacit acknowledgment of the lack of merit in their substantive constitutional claims, the Petitioners devote the bulk of their 68 page Petition to attacks on a variety of procedural rulings below. Respondents submit that the rulings challenged herein were well within the proper exercise of discretion of the District Court and, therefore, not erroneous. Moreover, even if any of such ruling was in error, the error was harmless and does not warrant this Court's consideration.

(a) *Standing and Ripeness of Issues*

Petitioners contend that a justiciable controversy was lacking because plaintiffs-respondents voluntarily obtained abortions outside of Rhode Island after commencement of this action but prior to final adjudication of the litigation.

In light of this Court's rulings in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973) Petitioners' contention is frivolous.[2] As the First Circuit said in rejecting Petitioners' arguments:

> Whatever justification defendants may believe they have for seeking to relitigate substantive matters, we can think of none for attacking the minor one of plaintiffs' standing, so fully considered in *Roe* v. *Wade*, ante, 410 U.S. at 125. Even if the question were open, the contention that plaintiffs should have to come to term in order to obtain a declaration of their right not to, seems reminiscent of the procedure under which persons wishing to avoid execution for witchcraft could establish their innocence by drowning. Petitioners' Appendix, p. 91.

Nor can any comfort be found by Petitioners in this Court's ruling in *Hodgson* v. *Randall*, 402 U.S. 967 (1971). First, that decision was rendered prior to *Roe* v. *Wade*, *supra*. Further, the decision in that case was addressed to the question of the standing of a doctor who had already

[2] Petitioners' argument borders on the bizarre for at the same time they contend that the plaintiff women have no standing, they also argue that it was error for the lower court to permit the action to proceed without the joinder as parties of many persons not directly affected by the challenged statutes including the husbands of the pregnant women of Rhode Island who do not desire abortions and men whose wives are not now pregnant but may at same future time become pregnant.

performed an abortion but who had not been indicted at the time suit was initiated. Thus the question before the Court was whether there was an immediate threat to the doctor's ability to exercise her constitutional rights. Finally, although not totally clear, it would appear from the lower Court's decision in that case, *Doe* v. *Randall*, 314 F. Supp. 32 (D. Minn. 1970) that plaintiff Doe terminated her pregnancy by an abortion performed in Minnesota prior to filing her federal action.

In contrast in the instant case, the plaintiffs were pregnant when this action began, and thereafter, because of the time consuming aspects of litigation, were forced to seek and obtain abortions outside of Rhode Island. Under such circumstances, this Court has held that the termination of a plaintiff's pregnancy does not terminate her standing to challenge State laws restricting her right to obtain a medically safe abortion in her home State. *Roe* v. *Wade*, *supra*. Accordingly, the trial court did not err in rejecting all challenges to the plaintiff's standing.

(b) *Class Action*

Petitioners assert that the trial court's designation of this action as a class action was erroneous because no notice was afforded the class.[3] If the trial court had erred in this respect, the error would clearly be harmless. Because of the nature of the relief sought by plaintiffs,

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[3] Petitioners also assert that notice should have been given to persons and classes of persons, not parties, who Petitioners contend have an interest in the litigation, to wit, fathers and fetal guardians. Their argument does not go to the question of the propriety of a class action, but is no more than a reiteration of their contention that the guardian *ad litem* and fathers were indispensable parties. See Pt. *(d)* and *(e) infra*.

whether or not the action was correctly certified as a class action, is not of great consequence. The effect of issuing a judgment declaring a statute *unconstitutional on its face* is precisely the same in either instance. Moore's Federal Practice, Vol. 3B, ¶23.40 (2d ed. 1973). In any event, under Rule 23 (b) (2) of the Federal Rules of Civil Procedure, notice to the class is not required, *Yaffee* v. *Powers,* 454 F.2d 1362 (1st Cir., 1972).

(c) *Necessity of a Three Judge Court*

The law is clear. A three judge court is not required when prior judicial rulings render insubstantial the constitutional claims or defenses asserted. *Bailey* v. *Patterson,* 369 U.S. 31 (1962), *Turner* v. *City of Memphis,* 369 U.S. 350 (1962). The District Court found that the decisions of this Court in *Roe* v. *Wade,* and *Doe* v. *Bolton,* made frivolous and fictitious any claim that the challenged statute, on its face, is not unconstitutional and thus determined that the case could be heard and determined by a single judge. Petitioners' App. pp. 78, 79. The Circuit Court summarily affirmed. Petitioners' App. pp. 90-92.

Moreover, even if the *Bailey* v. *Patterson* doctrine did not apply, there was no need to convene a three judge court because prior to trial the plaintiffs formally abandoned their request for injunctive relief and amended their complaint so as to seek only declaratory relief. See *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Steffel* v. *Thompson,* —— U.S. —— (March 19, 1974).

Finally, since in this case the defendant Attorney General stipulated to the procedure adopted by the District Court and consented to the entry of the Order which assigned the matter for trial before a single District Court judge,

he is estopped from challenging such procedure on appeal.[4] As the Court of Appeals said:

> "It is, at best, singular for a defendant voluntarily to say that he will respect a judge's order, and then to turn around and say that by his agreeing to do this he has deprived the judge of the power to make the order" (Slip Opinion Motion for Stay Pending Appeal, p. 4, June 6, 1973).

(d) *Intervention of Present and Future Fathers*

Petitioners' argument that denial of a motion to intervene by certain alleged fathers and potential fathers was grave error requiring this Court's consideration is totally without merit. The motion to intervene in this action was not made until about June 28, 1973, approximately five weeks after the District Court had entered its final judgment. Indeed, at the time the application to intervene was submitted, Petitioners herein had already docketed their appeal, and the Court of Appeals had denied Petitioners' motion for a stay pending appeal.

It is elementary that once Petitioners' appeal was docketed, jurisdiction vested in the Court of Appeals, leaving the District Court without power to act in the case. Thus, the District Court's denial of the motion to intervene was not error. Both *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* were decided without the joinder or intervention of any fathers or potential fathers of fetuses. Accordingly, the Petitioners' assertion that such fathers are indispensable parties to this action, is without merit.

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[4] The Petitioner, Constitutional Right to Life Committee, is in no different a situation. One Petition has been submitted by the parties and throughout these proceedings the parties have jointly defended in this action.

(e) *Intervention of "Guardian ad Litem"*

Finally, no substantial question is raised by the District Court's denial of the motion to intervene made by Anne Frank as guardian *ad litem* of fetuses.

It is clear from this Court's prior rulings that Ms. Frank was not an indispensable party to the determination of plaintiffs' constitutional objections to Rhode Island's abortion statute. In the case of *Doe* v. *Bolton,* 319 F. Supp. 1048, 1055 (N.D. Ga. 1970), a similar motion to intervene was rejected, yet thereafter this Court proceeded to determine the constitutionality of the challenged statutes. Numerous decisions of this Court establish that a fetus does not have a legal personality which must be represented in a dispute between a pregnant woman seeking an abortion and the state which is preventing her from obtaining that abortion. *Roe* v. *Wade, supra; Ryan* v. *Klein,* 93 S. Ct. 2747 (1973).

No new circumstances in the present case warrant reconsideration of this question.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD W. ZACKS
915 Hospital Trust Bldg.
Providence, R. I. 02903

CHARLES G. EDWARDS
1109 Hospital Trust Bldg.
Providence, R. I. 02903

NANCY STEARNS
Center For Constitutional Rights
853 Broadway
New York, N. Y. 10003

JANICE GOODMAN
BELLAMY, BLANK, GOODMAN, KELLY,
ROSS & STANLEY
36 W. 44th Street
New York, N. Y. 10036

Attorneys for Respondents

MELVIN L. WULF
JUDITH MEARS
American Civil Liberties Union
22 E. 40th Street
New York, N. Y. 10016
of Counsel

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